REPORTS

OF

CASES

ARGUED AND DETERMINED

IN THE

CONSISTORY COURT OF LONDON;

CONTAINING THE

JUDGMENTS

OF

THE RIGHT HON. SIR WILLIAM SCOTT.

By JOHN HAGGARD, LL.D. Advocate.

IN TWO VOLUMES.

Vol. I.

LONDON:

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1822.

TO

THE RIGHT REVEREND, AND RIGHT HONOURABLE,

THE LORD BISHOP OF LONDON,

&c. &c. &c.

THESE REPORTS OF CASES

DECIDED

IN THE CONSISTORY COURT OF LONDON,

ARE,

WITH HIS LORDSHIP'S PERMISSION,

MOST RESPECTFULLY DEDICATED,

BY HIS HUMBLE AND OBEDIENT SERVANT,

JOHN HAGGARD.

ADVERTISEMENT.

LORD STOWELL having retired from the Consistory Court of London, the Editor has thought that he should perform a service not unacceptable to the Gentlemen of his Profession, if he could collect together, in a public and permanent form, the principal Judgments, which his Lordship had delivered, upon various subjects of law confided to that Jurisdiction.

He has likewise flattered himself, that it might not be an unwelcome service towards the public generally, to bring to its view the exercise of the powers of Jurisdiction entrusted to that Court, many of which powers are highly important in themselves, particularly in the extent of their influence upon the security and comfort of domestic life.

In making the selection, he has given his attention more immediately to those cases, which involved general principles of the law applying to them—not deeming it advisable to introduce such

as turned upon mere questions of fact, and abstaining from a repetition of similar points, though occurring in cases not unimportant in themselves, and deeply affecting the interest of the parties to whom they related. He has to lament, however, that of several Cases, which from their importance would have composed valuable additions to this work, accurate notes could not be obtained, and that they live only in the imperfect but highly favourable recollection of those who happened to attend the Judgments.

From like considerations he has omitted Testamentary Cases, which are occasionally submitted to that Court, and which have been invariably decided according to the law established in the Prerogative Court, a Court possessing a more extended jurisdiction on such subjects, the course and tenor of whose proceedings is sufficiently communicated in Reports more immediately devoted to that purpose.

He has availed himself of such publications of particular cases, as have before appeared in an authentic form; and, in so doing, has to express his obligations to the late Dr. Laurence for the Report of Evans v. Evans, by whom it is understood to have been edited; to Sir Alexander Croke, for the Report of Horner v. Liddiard; to the Editor of the Report of Loveden v. Loveden; and to his friend Dr. Dodson, for the Report of Dal-

rymple

rymple v. Dalrymple; and of Sullivan v. Sullivan; all which make so conspicuous a part of this collection.

He has to acknowledge the obliging communications of the Gentlemen of his Profession during the progress of this work.—He is more especially indebted to Sir Christopher Robinson, King's Advocate, to Dr. Arnold, and Dr. Swabey, for their liberal communication of many valuable Notes, and much useful information respecting Cases, which had been adjudged during the period of time long antecedent to his own personal attendance at the Bar.

He has more particularly to tender his grateful thanks to Lord Stowell, for his condescending acceptance of his endeavours, and for the liberal assistance with which he has honoured them; and relies on his accustomed kindness to overlook imperfections, which are inseparable from an undertaking of this nature.

Doctors Commons,
28th March 1822.

CASES REPORTED

IN

VOLUME I.

A.

	Page
Anthony *v.* Seger -	9

B.

Bardin & Edwards *v.* Calcott - -	14
Barham *v.* Barham -	5
Barton *v.* Wells -	21
Beauraine *v.* Beauraine -	498
Beckford *v.* Hubbard -	307
Belisario *v.* Lindo -	216, App. 7
Bingham *v.* Duke of Portland - -	157
Bott *v.* Williams -	1
Bowzer *v.* Ricketts -	213
Breithwaite *v.* Hollingshead - -	470
Bromer *v.* Goldsmid -	324
Burgess *v.* Burgess -	384
Burt *v.* Cope - -	434
Butler *v.* Crompton -	460

C.

Calcott *v.* Bardin & Edwards - -	14
Chambers *v.* Chambers -	439
Cope *v.* Burt - -	434
Crompton *v.* Butler -	460

D.

	Page
Dalby *v.* Pritchard -	186
Denziloe & Loveland *v.* Hutchins - -	170
Denziloe *v.* Hutchins -	181

E.

Elwes *v.* Elwes -	269
Evans *v.* Evans -	35

F.

Ferrers (Lady) *v.* Lord Ferrers - -	130
Filewood *v.* Marsh -	478
——— *v.* Kemp -	487
——— *v.* ——— -	494
Forster *v.* Forster -	144

G.

Goldsmid *v.* Bromer -	324
Groves & Wright *v.* The Rector, &c. of Hornsey	188
Gunner & Drury v. Walter - - -	314

H.

Hodgkinson *v.* Wilkie -	262
Holden *v.* Holden -	453

	Page
Hollingshead *v.* Breithwaite - -	470
Hornsey (The Rector of), *v.* Groves & Wright -	188
Horner *v.* Horner -	337
Hubbard *v.* Beckford -	307
Hutchins *v.* Denziloe & Loveland - -	170
——— *v.* Denziloe -	181

K.

Kemp *v.* Filewood -	487
——— *v.* ——— -	494
Kirkman *v.* Kirkman -	409
King's Proctor *v.* Stone -	424

L.

Lagden *v.* Robinson & Green - -	501
Langston *v.* Stephenson	379
Lindo *v.* Belisario -	216, App. 7

M.

Maidman *v.* Malpas -	205
Margate, Churchwardens of, *v.* the Vicar, &c. of the same - -	198
Marsh *v.* Filewood -	478
Meyers *v.* Turner -	414

N.

Nash *v.* Nash -	140

O.

	Page
Oliver *v.* Oliver -	361

P.

Pertreis *v.* Tondear -	136
Portland (Duke of), *v.* Bingham - -	157
Pritchard *v.* Dalby -	186

R.

Ricketts *v.* Bowzer -	213

S.

Seger *v.* Anthony -	9
Sinclair *v.* Sinclair -	294
Smith *v.* Watkins -	467
Soilleux *v.* Soilleux -	373
Stephenson *v.* Langston	379
Stone *v.* The King's Proctor - -	424

T.

Tondear *v.* Pertreis -	136
Turner *v.* Meyers -	414

W.

Walter *v.* Gunner & Drury - -	314
Wakefield *v.* Wakefield -	394
Watkins *v.* Smith -	467
Wells *v.* Barton -	21
Wilkie *v.* Hodgkinson -	262
Williams *v.* Williams -	299
Williams *v.* Bott -	1

CASES CITED

IN

VOLUME I.

A.

Page

Allen *v.* Perkins - 215

Alvarez *v.* Vigevena & Silveira - - App. 7

Andreas *v.* Andreas - App. 9

Arabin *v.* Arabin - 98

Astley *v.* Biddle - 318

B.

Bailey *v.* Bradburn - 3, 99

Baker's Case - - 471

Ball *v.* Harris - 134

Barlow *v.* Bateman - 399

——— *v.* Chapman - 496

Batchellor *v.* Smallcombe 487

Beard *v.* Webb - 143

Beeby *v.* Beeby - 142

Biddle *v.* Astley - 318

Blackmore & Thorp *v.* Brider - - 393

Bolton & Gill *v.* Zachary & Stevens - - 383

Booth *v.* Stocks - 322

Boteler *v.* Boteler - 133

Bowes *v.* Strathmore - 131

Bracebridge *v.* Gilchrist 383

Brider *v.* Blackmore & Thorp - - 393

Brightwell *v.* Carleton - 496

Britton *v.* Wade - 162

Bromley *v.* Bromley - 141

Page

Brook *v.* Owen - 380

Brooksbank *v.* Hutchinson - - App. 7

Buller *v.* Harris - 463

Burleigh *v.* Filewood - 490

Burnet *v.* Hole - 318

Butterworth & Barker *v.* Walker & Waterhouse 199

C.

Cadogan *v.* Cadogan - 445

Carleton *v.* Brightwell - 496

Cartwright *v.* Cartwright 416

Chamberlayne *v.* Newte 495

Chapman *v.* Barlow - 496

Chauncy *v.* Ford - 382

Chislehurst Case - 174, 207

Chudleigh *v.* Hervey - 336

Cibber *v.* Cibber - 133

Clerke *v.* Heath - 162

Cloudesley *v.* Evans - 417

Cockburn *v.* Garnault - 435

Colefatt *v.* Newcomb - 22

Collins *v.* Wenmouth - 181

Cook *v.* Sir John Ferrars 383

Cornforth *v.* The King 341-5

Courtenay (Lord)'s Case 215

Croft *v.* Middleton - 20

Cummins *v.* Mayo - 141

Cunnington *v.* Coxe - 98

D.

	Page
D'Aguilar *v.* D'Aguilar -	134
Davenport *v.* Lockin -	489
Denniss *v.* Denniss -	446
Dixon *v.* Kershaw -	168
Dodwell *v.* Dodwell -	134
Donegal (Marq. of), *v.* March. of Donegal -	6
Dodgson *v.* Haswell -	App. 9
Dodson *v.* Oliver. -	496

E.

Edmonton, Inhabitants of, *v.* The King -	341, 358
Eliot *v.* Eliot -	302-3
Evans *v.* Cloudesley -	417
Ewer *v.* Moyle -	489

F.

Featherstone *v.* Hoskins	168
Ferrars *v.* Cook -	383
Fierville *v.* Heinel -	137-8
Filewood *v.* Talbot -	2
——— *v.* Burleigh -	490
Ford *v.* Chauncy -	382
Foster *v.* Lawrence -	342-4-9
Francis *v.* Strachey	168

G.

Gaches *v.* Haynes -	497
Garnault *v.* Cockburn -	435
Gilchrist *v.* Bracebridge	383
Goldingay *v.* Hill -	213
Gould *v.* Haydon -	App. 7
Grant *v.* Hedding & Ball	489
Green *v.* Green -	App.9, 10

H.

	Page
Hains *v.* Jeffel - -	353
Hall *v.* Machet -	497
Harford *v.* Jones -	318
Harris *v.* Ball -	134
——— *v* Buller -	463
——— *v.* Lyne -	159, 161
Haswell *v.* Dodgson -	App. 9
Hawknell *v.* Lumner -	463
Haydon *v.* Gould -	App. 7
Heath *v.* Clerke -	162
Hedding & Ball *v.* Grant	489
Herbert *v.* Lady Powes -	130
——— *v.* Dean & Chapter of Westminster -	168
Hervey *v.* Chudleigh -	336
Hill *v.* Goldingay -	213
Hinde *v.* Martin -	206
Hodges *v.* Richards -	351
Hodnett, Inhabitants of, *v.* The King -	344-8, 358
Hole *v.* Burnet -	318
Horsey's Case - -	471
Hoskins *v.* Featherstone	168
Hughes *v.* Priestly -	360
Hutchinson *v.* Brooksbank - -	App. 7

J.

Jeffel *v.* Hains -	353
Jones *v.* Harford -	318

K.

Kensington, Churchwardens of, *v.* Tryer -	318
Kershaw *v.* Dixon -	168
The King *v.* Inhabitants of Edmonton -	341, 358
——— *v.* Cornforth -	341-5
——— *v.* Inhabitants of Hodnett	344, 348, 358
Kingston (Duchess of)'s Case -	243, 290, 336

L.

La Costa *v.* Villa Real -	242
Lawrence *v.* Foster	342-44-49

	Page
Leicester (Lord)'s Case	148, 153
Lloyd *v.* Maddox -	290
Lockin *v.* Davenport -	489
Lovegrove *v.* Mason -	206
Lumner *v.* Hawknell -	463
Lyne *v.* Harris -	159, 161

M.

Machet *v.* Hall -	497
Mackintire *v.* Sumerfield	419
Maddox *v.* Lloyd -	290
Mallet *v.* Trigg -	165-8
Mansel *v.* Thorpe -	4
Marshall *v.* Rutton -	143
Martin *v.* Hinde -	206
Mason *v.* Lovegrove -	206
——— *v.* Wilson -	497
May *v.* Talbot -	496
Mayo *v.* Cummins -	141
Middleton *v.* Croft -	20
Mordaunt *v.* Mordaunt -	135
Morison *v.* Stewart -	417
Moyle *v.* Ewer -	489
Mule *v.* Mule - -	134
Musgrave *v.* Russell -	206

N.

Newcomb *v.* Colefatt -	22
Newland *v.* Osman -	351
Newte *v.* Chamberlayne - -	495

O.

Oliver *v.* Dodson -	496
Osman *v.* Newland -	351
Owen *v.* Brook -	380

P.

	Page
Page *v.* Shaw -	213
Parker *v.* Parker -	417
Pelling *v.* Whiston -	433
Perkins *v.* Allen -	215
Powes (Lady) *v.* Herbert	130
Price *v*, Thomas -	497
Priestly *v.* Hughes -	360

Q.

Quaker, Case of a -	App. 9
The Queen *v.* Stedman -	186

R.

Raybold *v.* Raybold -	99
Richards *v.* Hodges -	351
Ricketts *v.* Taylor -	303
——— *v.* Ricketts -	ib.
Russell, Case of -	473
——— *v.* Musgrave -	206
Rutton *v.* Marshall -	143
——— *v.* Rutton -	445

S.

St. John *v.* St. John -	143
St. Paul *v.* Ward -	340
Saunders *v.* Thompson -	206
Scarle, Case of -	141
Shaw *v.* Page - -	213
Stedman *v.* The Queen -	186
Strachey *v.* Francis -	168
Smallcombe *v.* Batchellor	487
Stevens *v.* Woodhouse & Buller - -	318
Stewart *v.* Morison -	417
Stocks *v.* Booth -	322
Strathmore *v.* Bowes -	131
Sumerfield *v.* Mackintire	419

T. Page

Talbot *v.* Filewood - 2
——— *v.* May - 496
Taylor *v.* Ricketts - 303
Thomas *v.* Price - 497
Thompson *v.* Saunders - 206
Thoroton *v.* Thoroton - 360
Thorpe *v*, Mansell - 4
Trigg *v.* Mallet - 165-8
Tryer *v.* The Churchwardens of Kensington - 318

V.

Vigevena & Silveira *v.* Alvarez - - App. 7
Villa Real *v.* La Costa - 242

W. Page

Wade *v.* Britton - 162
Walker & Waterhouse *v.* Butterworth & Barker 199
Ward *v.* St. Paul - 340
Wenmouth *v.* Collins - 181
Westminster, Dean and Chapter of, *v.* Herbert 168
Whiston *v.* Pelling - 433
Wilson *v.* Mason - 497
Wilson *v.* Wetherell - 97
Woodhouse & Buller *v.* Stevens - - 318
Woodcock *v.* Woodcock 143

Z.

Zachary & Stevens *v.* Bolton & Gill - 383

ERRATA TO VOL. I.

Page 1, *l.* 5, *and margin*, office *read* name
102, 11, (*n*) effect *read* affect
107, 14, *dele* not
134, (*margin*) desp. *read* disp. *dele* sect.
135, 20, (*n*) *after* of *insert* the
136, (*margin*) G. 3. *read* G. 2.
145, 19, damage *read* damages
P. 147, *l.* 8, dediisse *read* dedisse
— 12, adulteri *read* adulterii
202, 25, *dele* in
208, 7, *after* Courts, *insert* and
211, 15, Clergyman *read* Clergymen
259, 17, (*n*) *read* conjecturata
360, (*note*) 22nd *read* 26th.
381, 26, Andrews *read* Andrew.

ERRATA TO VOL. II.

P. 146, *l.* 19, was *read* were
205, 1, (*n*) said *read* suit
211, 12, *et seq.* Widowcroft *read* Widdowcroft *and* Wedowcroft, Widowcroft
229, 11, *after* privacy *insert* is
281, 4, *read* Harvey Lord Hawke
294, 5, la *read* le
299, 4, (*n*) deneganti *read* denegante
— 10, loco *read* loc
354, 26, comparately *read* comparatively
P. 361, *l.* 15, also App. p. 168, Conway *read* Coway

165, 15 to 21 *dele* inverted commas.
204, *ult.* (*n*) *insert* comma *after* libel, and *dele* comma *after* issue.
300, *penult.* (*n*) *dele* comma *after* mulierem, *and insert it after* commisisse.
301, *ante penult* (*n*) *dele* comma *after* omnes.



CASES

DETERMINED IN

THE CONSISTORY COURT

OF

LONDON,

&c.

The Office of the Judge promoted by WILLIAMS v. BOTT.

THIS was a question as to the pleading in a cause of Office, or a criminal suit, respecting the effect of a wrong description of the office of the Judge. In the citation the party was called upon to appear before Sir *William Scott*, and the original articles were conformable to the citation; but in the copy delivered to the proctor of the party, by the proctor of the promoter, the proceedings were described as being in the name of Sir *William Wynne*.

27th *May* 1789.

Pleading in a criminal suit.—Office of the judge wrongly described, in a copy of the articles, fatal.

In support of the validity of the proceeding it was contended, that the original process being right, and issue given, the variation was not fatal; that according to ancient practice, all papers ought to issue from the Registry, as the answers do now. That it was the duty of the proctor, receiving the process, to collate it with the original, and a charge was allowed for that service; that in cases where a misnomer of the party was considered to be fatal, the error appeared in the original process, whereas here it was a mere clerical error, from which no inconvenience could arise, unless the proctor could shew that the copy was the only paper to which he could refer. That in a late

WILLIAMS v. BOTT.

27th *May* 1789.

case before the Commissary of *Surry* * the name of the Surrogate was inserted in the original citation, but omitted in the copy, which might have been material: the objection was overruled, and there was no appeal; it was there said the objection ought to be taken before issue joined. † In this instance the issue had been joined after the proctor knew of the error.

JUDGMENT.

Sir *William Scott.*—This is a proceeding in which the Office of the Judge has been promoted against the party under the 5 & 6 *Ed.* 6. ch. 4. " for *quarrelling, chiding,* or *brawling in the church,* or *church-yard,*" and it has truly been said, that the Court is not disinclined to admit suits of this kind, since It is bound to carry the provisions of the law into execution, on this subject, as well as on others; but the party charged is entitled to avail himself of every legal objection, and is certainly not to be considered in an unfavourable light on that account. The party is cited before *me,* and the articles are in my name, but the copy delivered is in the name of my Predecessor, and the question is, whether such error is fatal? It may be proper to consider what would have been the effect of such an error in the original? since, if it would not have been essential there, it would not be so in the copy; but I am of opinion it would have been a ground of nullity in the original, as the suit could not be maintained in the name of Sir *William Wynne;* the objection would have been a plea in bar and not merely in abatement. In the case of *Filewood* v. *Talbot,* which has been cited, the name

* *Filewood* v. *Talbot,* 24th *January* 1789.

† *Oughton, Ordo Jud.* tit. 60.

of

WILLIAMS v. BOTT.

27th *May* 1789.

of the Surrogate was rightly described in the original, but omitted in the copy, and that omission might be no fatal error, as the *name* might be surplusage, the description of the office being itself sufficient, and there being no direct opposition betwen the original and the copy; but *here* a person is described *nominatim*, in whose name the suit could not be introduced. To whatever length the proceedings had gone, they must have constituted a nullity, if the error had been in the original, and uncorrected.

But it is said it might have been corrected.— In a plea of abatement, an objection, on the ground of misnomer of the party, if not taken before issue, would be too late; for, by giving issue, the party allows himself to be the person designed. This was the case in *Bailey* v. *Bradburn* *, in which it has been said the error was allowed to be rectified. There the party had appeared and suffered the proceedings to go on; here the wrong description of the Judge is different, for no admission of the Judge can give him authority, even if an undue admission had been made by the party. The passage from *Oughton* † does not go so far as this, since the words are "*actoris vel rei*" only, and the expression "*quocunque alio*" must be understood in *pari materiâ*, and not generally and in an unlimited sense. I think therefore it could not be corrected in the original; and the only remaining question is, what ought to be the effect in the copy? If it has the effect of an original to the party, the consequence already pointed out may fairly be allowed to apply. Anciently it might not be usual to deliver copies at all, but in later practice it has been differently held, and the copy is that to which the party imme-

* Consist., 27th *November* 1788.

† Tit. 59. s. 1. 4.

Williams v. Bott. — 27th *May* 1789.

diately looks. An error in the copy must have the effect of an original to him, and would even be less subject to the authority of the Court than the original, which might have been corrected; for the Court could not order the party to deliver back the copy, having become his property by the delivery. It is said, that the principal object of delivering a copy is to prevent delay, and that the proctor might collate it, if necessary for his party. He may be bound to do that for the benefit of his client, but his obligation goes no further. I think the variance is essential, in the copy as well as in the original, and that the party is entitled to take advantage of it, and, in consequence, to be dismissed.*

* Affirmed on appeal, 7th July 1789.

20th *July* 1810.

* In *Thorpe* v. *Mansell*, — On objection, that *articles*, for an offence under the same statute, were in the name of the Judge, as *Vicar-General* and not as *Official Principal*, The Court said, — It is not too late to take a fundamental objection at any time of the proceedings, and the question therefore is, whether the present objection can be so considered from the character of the two offices? The Vicar-General is the Representative of the Bishop, and in later times has proceeded only in matters of voluntary jurisdiction (*a*), as in the granting of licences, where there is nothing of litigation or contention between the parties. But it appears from the authorities (*b*), that he has also a criminal jurisdiction, — a power to enquire into crimes, and punish them; but it is not now stated how this inquisition is to be pursued, whether in a forensic form, or as the Bishop himself would exercise it in his own hall of audience, or more privately. I think, however, the description given of the *Official Principal* does almost exclusively give to him the cognizance of such offences in this court. As Vicar General, I am not sure that he could exercise it. I am of opinion, therefore, that the omission is fatal, as it is clearly the Official Principal whose office is meant to be promoted *here*. I think this omission would affect the citation and any instrument under it. I am under the necessity of dismissing the cause with costs.

(*a*) See also *Hericourt*, Loix Eccl. de France, tit. Vic. Gen. p. 23.
(*b*) *John de Athon*, in Const. Othon. tit. De Instit. Vicar.

BARHAM *v.* BARHAM.

13th *June* 1789.

Divorce—Protest, as to the validity of the appointment of the guardian of the wife, *ad litem*—and as to the effect of a citation, describing the party in a wrong parish, but cured by appearance, over-ruled.

THIS was a case of divorce by reason of cruelty and adultery, brought by the wife against the husband, in which the husband appeared under protest, and prayed to be dismissed on the ground of the incompetency of the person, in whose name the suit was brought, as guardian of the wife, to institute proceedings; and, secondly, on the ground that he was described in the citation as being of a wrong parish.

JUDGMENT.

Sir *William Scott.*—This is a suit brought against the husband, who has taken a peremptory objection to giving an appearance on two grounds: first, of the incompetency of the person suing; and, secondly, of the false description of the person cited. The first objection is, that the grandfather of the wife, in whose name the suit is brought, as guardian or curator assigned by the Court on the renunciation of the mother, is not a competent person; since it does not appear that the renunciation of the mother, on which his appointment depends, was made with the consent of her husband; but it appears to me not to be necessary to enter into the question, whether the husband of the mother could dispute the effect of the appointment, with reference to the validity of the mother's renunciation; since it will be enough if a third person cannot take advantage of such an objection. The Court finds a guardian apparently appointed with

 sufficient

BARHAM v. BARHAM.

13th *June* 1789.

sufficient regularity, and unless that appointment is shewn by some presumptive proof to have been invalid, the Court will presume the person properly qualified to receive it. It is said that the appointment is too general, and in such a form as would not be allowed by the common law. A reference has been made to some cases of general appointments, for all concerns of personal estate; but *here* the appointment is precisely limited, not only for carrying on suits, but for this suit particularly. It might be another question if the objection applied to another suit; but this suit is specifically mentioned, and there is a regular act of guardianship not objected to by the person, on whose right alone the objection could be founded. It has been said, that the wife might appear for herself, being a femme coverte, though a minor, notwithstanding the course of practice has been otherwise; and that although at common law the husband and wife are *eadem persona*, in the civil law they are distinct, and that a wife, can sue her husband; but if so, she is subject to other legal disabilities, and particularly to that of minority. I have no doubt, therefore, of the competency of the person instituting the suit.

The second objection is, that the party is cited in a wrong parish. It might be more material if it was a wrong jurisdiction, for then it might be contrary to the statute of citations*; but it is not so,

* Vice Chancellor's Court, 4th *Aug.* 1821.

* In the case of the Marquis of *Donegal* v. the Marchioness of *Donegal* *,—Mr. *Arthur Chichester* applied for a prohibition to restrain the Judge of the Consistorial Court of *London* from proceeding in a suit of nullity of marriage, instituted by the Marquis of *Donegal*

so, as both parishes are in the same jurisdiction. He is described as of the parish of *St. Andrew, Wardrobe*; and it is stated, that he lived in a house in that parish, till after the suit was commenced, and that he is still answerable for the rent, but had left the house, and had become a lodger in a public house, in the parish of *St. Mary, Abchurch*, before the citation. This objection, then, is reduced to a simple misnomer, or false addition, an objection which is very fit to be supported on the danger of citing a wrong person, but not to be carried further; and unless it appears that a

BARHAM *v.* BARHAM.

13th *June* 1789.

Donegal against the Marchioness. One ground for prohibition was stated to be, that Lady *Donegal* had been constantly residing in *Ireland* for the last four years out of the local jurisdiction of the Court. But the Vice-chancellor refused the prohibition, observing that the writ of citation against the Marchioness of *Donegal*, described her as resident in the parish of *St. James, Westminster*. If it had been directed to the Marchioness as living in *Ireland*, then, on the face of the record, it was clear that the Court had no jurisdiction in the case. She might, if she had chosen, have objected that she was living in *Ireland*, and consequently was not resident within the jurisdiction of the Court; but she did not think fit to do so, but appeared and pleaded to the citation. This then was an admission on her part that she was properly described as living in the parish of *St James, Westminster*, and he was bound to say, that having once pleaded to these facts, she had no right to withdraw from them at any time before sentence was pronounced. If the Marchioness could not retire, being concluded herself, she had also concluded an intervening party. The jurisdiction of the Ecclesiastical Court depended not on the locality of the subject, but on the locality of the person. How then were the interests of Mr. *Chichester* to be prejudiced by the proceedings being instituted in *London* instead of *Ireland?* His Honour was therefore of opinion, on authority and principle, that the Marchioness *Donegal* was now precluded from objecting, having submitted to the jurisdiction, and that Mr. *Chichester* was bound by her submission.

23 H. 8. c. 9.
Canon 106.

 wrong

BARHAM v. BARHAM.

13th *June* 1789.

wrong person is proceeded against, the Court is not willing to attend to such objections. Here the Court may collect, with certainty, from the affidavit of the party, that he is the person designed, and that there is no danger of proceeding against a wrong person. The identity therefore being proved to the satisfaction of the Court, and the jurisdiction being the same, the Court is inclined to hold the party bound by this citation. What is stated is, "that though he is answerable "for the rent of a house in the parish described "in the citation, he has lodged and boarded at a "public house in another parish." But a man may have two residences; and there are cases where it has been held, that the practice of dining at a house in a parish is sufficient to render a person liable to be considered as of that parish. Here is the occupancy of a house, which is abundantly sufficient. I therefore overrule the protest, and assign him to appear absolutely. *

* Affirmed on appeal, 4th Feb. 1790.

A prayer was also made on the part of the husband, that he might be admitted a pauper, which was rejected.

ANTHONY *v.* SEGER.

THIS was a question arising on the election of churchwardens in the parish of *Ealing*, at a vestry held for that purpose, on the following facts: *Le Cornu* and *Wincuffe* were nominated, and also Mr. *Anthony*, and on a shew of hands in favor of the former two, a poll was demanded; and on casting up the poll the numbers appeared to be, for *Le Cornu* 38, for *Wincuffe* 35, and none for *Anthony*; but an objection being made to *Le Cornu* when he applied to take the oaths, that he was an alien, he admitted the fact, and was declared ineligible, and a motion was made to admit *Anthony* as elected.

27th *June* 1789.

Election of churchwarden. Alien disqualified; effect of the poll considered as to the other parties, on the disqualification of the person elected. Re-election.

On the part of *Anthony* it was contended that those who had held up their hands for him, had also given in a paper to the same effect; and in so doing, had actually voted and polled; that on the disqualification of the other candidate, the person for whom they so voted was entitled to be considered as duly elected.

On the other side it was argued, that the poll, as taken on the poll book, was the only regular election; the shew of hands being but an experiment to save trouble, and completely annihilated, when the poll was demanded. The Court directed the poll book to be produced; and on a subsequent day affidavits were brought in—of the vestry clerk swearing that he saw no poll book,—and of twenty-five other persons swearing that there was one.

4th *July*.

The

ANTHONY *v.* SEGER.

27th *June* 1789.

The vestry book was exhibited, in which there was an entry of *Le Cornu* and *Wincuffe*, as duly elected, but none as to *Anthony*.

JUDGMENT.

Sir *William Scott.*—The proper and regular method is for the churchwardens to return two persons to succeed them; but this is not exclusive of other methods, and though customary, it is not indispensably necessary, provided the Court has satisfactory information of the election in any other way. When the persons elected by this parish presented themselves, an objection was made on behalf of the parish, that one of them was an alien born, and of course not eligible; that the votes given for such a person were thrown away, and that another who had been put in nomination, and had a few votes, was duly elected.

An alien born has no right, as has been determined here concerning the claim of an alien naturalized to this office, and so, elsewhere, with respect to the offices of Constable or Overseer, as not the smallest portion of authority in this country can be regularly intrusted to an alien. The fact therefore being admitted, that person was properly rejected. A contrary position has indeed been intimated, and it has been said that there would be ground for a mandamus,—but inaccurately, for offices the most ministerial leave a discretion not to join in an illegal act, and if a parish had returned a papist, or a jew, or a child of ten years of age, or a person convicted of felony, I conceive the Ordinary would be bound to reject. To say that a mandamus would lie is no objection, for the Ordinary is not to give way without the authority of some higher Court actually expressed; and though it is the duty of the Ordinary not to take slight objections,

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he is bound, I conceive, to take care, that an election, in his opinion void in itself, should have no legal effect, and this is a duty which he owes to the parish, and to the general law of the country. The question is then, whether the person who had the minority of votes is duly elected? Neither party having resorted to the method which might have been taken, of applying for a mandamus, the question for the present is left open to the Court, and It has directed affidavits to be made of the facts.

It appears that Mr. *Le Cornu* and Mr. *Wincuffe*, and also Mr. *Anthony*, were put in nomination, and a paper was delivered by one person, claiming on behalf of a particular district the right of electing a churchwarden for that part of the parish, and that paper was signed by several persons. There is some dispute when this paper was signed, before or after the shew of hands, which might be material. In one affidavit it is sworn to have been before, in others after; I think the probability is that it was before; because it does not seem to have arisen from any thing which passed at the time, but from a notion of a local privilege, which had been entertained before; and in the contrariety of evidence on this fact, I may conclude, that this paper was delivered *before* the shew of hands. On that supposition, it would not be for the purpose of a poll, as has been suggested in argument, since it could not then be known, that the election might not be decided by a shew of hands; and therefore this paper could not be delivered for the purpose of inserting the names on the poll. It has been contended, that *Anthony* being put in nomination, the votes that were given for an ineligible person were thrown away, and the parish could not proceed to another election:

ANTHONY *v.* SEGER.

27th *June* 1789.

and it is certainly a rule of reason and of common sense, that if persons will knowingly throw away their votes on a person by law ineligible, such votes must be considered as lost. But it must be shewn that this was the case, otherwise the law will presume that they acted in ignorance of the fact; and in that case it would be hard that they should lose their votes, and that another person should be obtruded upon them. In this case it is not shewn to have been stated to the parties that *Le Cornu* was an alien, and therefore it is not reasonable that another person should be forced on the parish on such an election, as if it had passed regularly. It appears that *Le Cornu* had served before; it is fair therefore from that circumstance to suppose, that the parish was not acquainted with the objection, but that it thought him perfectly eligible.

Under these circumstances, the shew of hands being very considerable for the old church-wardens, a poll was demanded; and it is not without surprise that I have seen the affidavit of the vestry clerk, declaring, to the best of his recollection, that no poll was demanded, in contradiction to all the other witnesses on both sides; since he ought to have been more accurate in his observation than other persons. A poll was demanded, and the question is, what was done at the poll? I think it appears clearly that the only persons polled for were *Le Cornu* and *Wincuffe*. There is no evidence that one vote was given for *Anthony*; and I see no evidence that the paper was delivered to the vestry clerk for any purpose of polling, or that any thing was done by the persons who signed it to follow up their nomination. Then how is the Court to consider what was done before? Can

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ANTHONY v. SEGER.

27th *June* 1789.

it hold, as was contended in argument, that when a poll is demanded, every thing that has been done before still continues valid? I think not. Where a poll is demanded, the election commences with it, as being the regular mode of popular elections; the shew of hands being only a rude and imperfect declaration of the sentiments of the electors. It often happens that on a shew of hands, the person has the majority, who on a poll is lost in a minority; and if the parties could afterwards recur to the shew of hands, there would be no certainty or regularity in elections. I am of opinion, therefore, that when a poll is demanded, it is an abandonment of what was done before; and that every thing anterior is not of the substance of the election, nor to be so received. Then as the poll destroys the previous voting, and no poll appears for *Anthony*, and the vestry book, which must be taken to be the authentic book, makes no mention of him, I cannot look on him as elected.

It is said, that it is improper that the old churchwarden should be continued: this may depend on the discretion of the parish; the Court has no authority to interpose, except in deciding on a dubious case. The election being referred to a poll, and the nomination of *Anthony* not having been followed up by any act on the poll, I must hold him not duly elected.

On the question of costs, I think there is no ground for giving costs; it is not a private case, but a proceeding to try a public right, and recommended by the Court itself at the visitation, unless they thought fit to apply for a mandamus. I shall therefore only direct the parish to proceed to another election as soon as may be after regular notice.

THE OFFICE OF THE JUDGE PROMOTED BY

BARDIN AND EDWARDS *v.* CALCOTT.

11th *July* 1789.

Proceedings against a person for erecting tombs in the church-yard without due authority, sustained.

THIS was a case of Office promoted against *Thomas Calcott*, for erecting tombs in the church-yard of *Kensington*, without due permission or authority.

JUDGMENT.

Sir *William Scott*.—This is a case of Office promoted against *Thomas Calcott*, for three offences of the same general description,—in erecting tombs in the church-yard of the parish of *Kensington*,—without leave of the Ordinary or the Churchwardens. There is no question remaining as to the jurisdiction, that point having been fully debated on the admission of the articles. The church-yard, as well as the church, is the freehold of the Minister, subject to the right of the parishioners for interment. Ancient custom often annexes fees for erecting a stone, or any thing else, by which the grave may be protected and the memory of the person interred preserved. It is no general common law right; but custom will interpose, and, where *it is* shewn to be customary, such practice will be supported. As to buildings of height, the authority is reserved to the Ordinary; and permission ought not to be granted without his authority in some manner interposed. The proper mode, strictly speaking, is to apply to the Ordinary for a faculty,

faculty, who calls on all persons having a right to shew cause why it should not be done, and hears and determines on the force of any objections that may be made against it. The 3d Inst. leaves the matter at large; but all commentators say that the Ordinary is to judge of the convenience of allowing tombs or monuments to be erected, and that if done without his consent, he has sufficient authority to decree a removal. This is the rule of law laid down in *Gibson*, and therefore the Court has only to see how it has been observed; for although no particular inconvenience may have been sustained, if a general rule has been infringed, it will be sufficient to found the censure of the Court; since it is not necessary that a special inconvenience should be proved in any particular instance.

BARDIN, *v.* CALCOTT.

11th *July* 1789.

3 Inst. p. 202.

Gib. Cod. p. 454.

In this case three offences are charged; the first is for repairing a tomb without leave of the Churchwardens; and the evidence on this charge, as it is to be found in the depositions of *Huntley*, one of *Calcott's* men, is, "that he was ordered to repair "the brick-work, and for that purpose he took "off the flat stone, and took down three courses "of brick-work above ground, and next morning "finished it as it was before. That the sexton "came to him, when he had nearly done, and "asked him how he came there? to which he answered, that he had borrowed the keys of the "clock-maker, and as he had nearly done, he "should stay and finish his work." *Stratford* says, "that he carried a message from *Bardin* the "Churchwarden to *Calcott* not to make any *alterations*, at five o'clock in the morning; but he "afterwards saw that he had removed the stone "as before described."

Then

BARDIN v. CALCOTT.

11th *July* 1789.

Then what is this offence? Not that of erecting any structure; nor of making addition to it, but merely of repairing what had been already placed there by proper authority, according to the custom of the parish. Then came the prohibition to do, what had not been intended to be done, namely, to make any *alterations*, and the man continued only to restore and place every thing as it was before. No alteration or addition was actually made. The only conceivable fault, then, in this part of the case, is, that it was done without the leave of the Churchwardens. It might have been proper to apply for leave; but the Churchwardens were bound to grant it, as far as their authority extended; and if they had not, they would have been liable to the censure of the Court. It is of public consequence that monuments, once built should be preserved; and if parties are not at liberty to repair, the object of obtaining leave to erect would be defeated. Monuments are memorials of great use in questions of descent, and consequently, in matters of family interest; and decency and propriety likewise require that they should not remain in a state of ruin and decay. It is rather the duty of Churchwardens to encourage parishioners to provide that they may be put into repair, than to obstruct others in doing it. The only fault in this instance was, that the person so employed did not observe the proper formalities of making application. The complaint, on that ground alone, is one which I am not inclined to visit with severity, although it might have been proper to have made the application, inasmuch as nothing should be done in a Church without the knowledge and consent of the Churchwardens.

The other charges are for original buildings, and are the subjects of very different consideration. The evidence on the first of these relates to the tomb of one *Wilson*, who was not a parishioner; and the churchwardens have been blamed in the argument, for allowing strangers to be buried there. This is a permission, undoubtedly, which should be sparingly granted, since there can be no absolute claim of that kind; but I think there is enough shewn to prove that the Churchwardens in this parish are authorized to give such leave, since there is a table of fees produced, in which there is one "for the burial of strangers." The clerk says, that *Calcott* applied to him to be informed as to the fees, which are paid both to the Vicar and to the parish—to the Vicar, of common right, and to the parish, as established by custom. It appears that permission was asked for laying a flat stone, and that the sum of eight guineas was mentioned as the fee.

A question is raised as to the meaning and extent of this permission: No plan was exhibited, and I think it must be understood as for a flat stone. If permission is asked and granted on the usual terms, and the usual fee is paid, it must be interpreted according to the custom of the parish. Witnesses have been examined to prove what the custom is, and none on the opposite side; and I am satisfied that the practice has been, to lay a flat stone, and no more, only with so much support as may be necessary to prevent it from sinking into the ground. It appears that *Calcott* carried the brick-work higher; the Curate interfered; and the Churchwardens objected, and ordered him not to proceed. Two persons swear that they carried the message to

BARDIN v. CALCOTT.

11th *July* 1789.

Calcott, forbidding him to proceed further. If there had been any mistake, therefore, it was now explained. There is no evidence that any permission for more than a flat stone was originally given, and if it had, it was not now too late to recede. It has been said, that there was no harm in this; but I think there is a difference between the use of a flat stone, and that of a building of greater height; and the parish has recognized that difference, by permitting the one, and disallowing the other. At any rate, uniformity is injured, and the free access to the different portions of the church-yard is obstructed. It is said that it is not necessary to consult the Ordinary, and that it is troublesome so to do; but such liberties, if not allowed by the custom of the parish, should not be taken without the control of the Ordinary, who is the proper guardian of the rights of the parish against intruders, and also against the avarice of any individuals, who might be tempted, for their own benefit, to grant leave, to the future inconvenience of the parish. On this charge therefore I think it is sufficiently proved that leave was not given for what was done; and if there was any misapprehension, it was corrected at such a time that the party ought to have desisted.

The third charge relates to the monument of Mr. *Lambert*, and it is said that fuller permission was granted in this instance by the Churchwarden to the widow, *to do what she thought fit*, which would be very improper, if given by them, and a very undue exercise of their authority. The witness *Taylor* says, " that he was present when leave " was asked to do the same as in *Wilson's* monu- " ment; that the Churchwarden said ' it was more " than he had a right to do, but that he would " not

BARDIN v. CALCOTT.

11th July 1799.

" not officially interfere;' that the workmen carried " the brick-work a foot higher." The widow says " she applied for leave, paying the usual fee," which must be restrained to some definite meaning, and ought to mean nothing else, than that it was for the usual indulgence; and accordingly it appears, " that she actually paid eight guineas," being the usual fee for a flat stone; " that she " went to the Churchwarden, and said, she meant " to do it as in *Wilson's* monument, and that it " was very hard she could not do it as she thought " fit." This does not strictly agree with the account given by *Taylor*, she says further " that she " gave directions to do the same as in *Wilson's* " monument, and that it appears to her not to be " so high." The other witnesses say, " that it is " higher." From my own personal inspection within these few hours I can say that there is a considerable difference. It is visibly higher. I am sorry to observe such an assertion in the affidavit of this witness. Whatever the permission was therefore, it was exceeded. *Calcott* was ordered by the Churchwardens to desist, and whatever other orders were given by the party, they ought not to have been regarded.

It appears, then, that there have been two trespasses in this church-yard, which is a consecrated place, entitled to public protection, and in which nothing should be done but under the direction of public authority. We know, indeed, that many things are often done there that are indecorous enough, as the drying of linen, and spinning of ropes, and other practices that are unseemly enough in such places, but which, importing no special or permanent damage, are overlooked with

BARDIN v. CALCOTT.

11th *July* 1789.

that sort of laxity which is apt to be exercised upon property of a public nature, and, in which, no man possesses a particular interest. It is of public importance, however, that these public rights should be protected, and the offence being proved, it is only necessary to inquire what the sentence ought to be. The two latter charges are proved, and it will be my duty, in the first place, to admonish the party to desist. There is no prayer for any order to pull down, and there would indeed be a difficulty in pulling down without further directions for building up. I think therefore, that I shall best obviate the inconvenience that might ensue to the parish, by confining my admonition to the party to refrain.

On the subject of costs, it is said, that as some of the charges are proved, the promoter is entitled to his costs. But I do not accede to this position, or think that it is just, that if ninety-nine charges are made, and some few, or one only, proved, the party is to be charged with the expences of the whole proceeding *. I shall therefore give a sum *nomine expensarum;* and in consideration of the length of the case, and of the number of witnessses which the party has examined, and of his general good character, which weighs with me, I shall fix that sum at thirty pounds.

* A similar rule seems to have been held, on the quantum of costs, in the King's Bench in *Middleton* v. *Croft*, 2 *Strange*, 1056, —the case in which Lord *Hardwicke* delivered the judgment of that Court against the force and effect of the Canons of 1603 as not binding on the Laity.

THE OFFICE OF THE JUDGE PROMOTED BY

BARTON *v.* WELLS.

17th *Nov.* 1789.

Jurisdiction of the Bishop of London, over *Ely* chapel, established.—Exemption, of ancient privileges allowed to the Bishops of *Ely*, in virtue of their episcopal residence, in *Ely* palace, overruled, as not continuing after the property had been transferred.

THIS was a suit of Office promoted by Dr. *Barton*, Rector of *St. Andrew, Holborn*, against Dr. *Wells*, for performing divine service and administering the sacraments in *Ely* Chapel, without licence from the Bishop of *London*.

JUDGMENT.

Sir *William Scott*.—This is a proceeding by Dr. *Barton*, Rector of the parish of *St. Andrew, Holborn*, against Dr. *Wells*, for performing divine service, preaching, and administering the sacraments in *Ely Place* Chapel, without a licence from the Bishop of *London*. The fact is admitted, and though the form of this proceeding is criminal, the suit is brought for the purpose of trying the civil right, and the real parties may be said to be the Bishop of *London*, and the Bishop of *Ely*, or the Grantee of the Crown. In one of these persons the jurisdiction resides; Dr. *Barton* lays it in the Bishop of *London*, Dr. *Wells* in the Bishop of *Ely*, *or* in the Grantee of the Crown, though it cannot be in both; and the Counsel for Dr. *Wells* have argued it almost entirely as for the Grantee, and thereby seem rather to admit that the Bishop of *Ely* must be excluded. I may add also that the nature of the present proceeding scarcely raises the question of general jurisdiction; since it is founded only on the charge of officiating in the performance of divine service without a licence.

 In

BARTON v. WELLS.

17th Nov. 1789.

In many chapels it is necessary that the Minister should have a licence, or institution from the Bishop, although the Bishop may have no general jurisdiction over the place. * Free chapels are of that nature; and in many pure donatives, the Bishop has authority over the persons officiating, though not over the place. †

The question then is, whether it is necessary that Dr. *Wells* should have a licence from the Bishop of *London* to officiate in *Ely* Chapel? and not, whether the general jurisdiction of the Bishop of *London*, as Ordinary in a larger sense, may extend there. On the part of Dr. *Wells* it is not shewn under what authority he acts; he declines all authority from the Bishop of *London*, and alleges none from the Bishop of *Ely*, or from the Grantee; and he may be said, almost, on his own representation, to stand in the character of a mere intruder. The Court is under the necessity therefore of supplying this defect, by information derived from other sources, or from presumption founded on the tenor of the defence; and I must presume that he officiates by permission of the Grantee of the Crown, in whom the Counsel contend that the right resides of appointing an officiating Minister, without the control of the Bishop of *London* as general Ordinary. Such

* "Free chapels were places of religious worship exempt from all jurisdiction of the Ordinary, save only, that the Incumbents were generally instituted by the Bishop and inducted by the Archdeacon of the place." *Tanner*, Not. Mon. Pref. p. 28.

"Free chapels may continue such, in point of exemption from ordinary visitation, though the head or members receive institution from the Ordinary." *Gib.* Cod. p. 211. Registr. f. 307 b. cited, ibid.

† *Colefatt* v. *Newcomb*, Ld. *Raymond*, p. 1205.

a claim

BARTON v. WELLS.

17th Nov. 1789.

a claim must be supported by clear proof, since it is against common right and order; and all presumptions of law must be held strongly against such a breach of the general rules of our ecclesiastical constitution, especially when it may lead to great irregularity and inconvenience. Many anomalies may have existed in former times, when special privileges were more easily allowed, which have been long discountenanced. Where they still can be shewn to exist on legal ground, they remain as ancient fixtures, not to be removed, though placed at variance with more correct principles, and retained not without some sacrifice of general convenience and propriety; but when their legal existence is in question, the Court must incline against them, and prefer the known rule, till the grounds, on which they are to be supported, are clearly and indisputably established.

The ground assumed in this case is, that *Ely* Chapel was an ancient chapel of the Bishop of *Ely*, and within the diocese of *Ely*, as part of the Episcopal House, which was conveyed by act of parliament, with all rights, privileges, and immunities, to the Crown; that, in this manner, it became part of no diocese whatever, and was afterwards granted by the Crown to the present Grantee, who holds, as the Crown held, free from all jurisdiction. On this plea, it is necessary to consider, first, the ancient state of the place, and, secondly, the changes which it has undergone. On these points, the case is very slightly instructed in the evidence. The whole rests on the ancient constitution of the place; but *when* it was founded, or *when* it came into the possession of the see of *Ely*, or how it stood while

BARTON v. WELLS.

17th *Nov.* 1789.

it was the property of that see, or in what particular it was separated and distinguished from its former relations, does not appear. It is the duty of the Court, therefore, to look further, as the rights of other persons, besides the immediate parties, are concerned; and It must take other information, if it is to be had, and so far as it can be properly introduced. General authentic history is of that kind. It appears from thence, that the see of *Ely* was founded in 1109, but that of *London* subsisted many ages before. The house was purchased by Bishop *Kirby* in 1290, consisting then of a messuage and several cottages *. His successor, Bishop *De Luda*, purchased more houses, and left them to the see on payment of 1000 marks to his executors *. It is not shewn at what time the chapel was built; but it must have been either by Bishop *Kirby* or *De Luda*, since there is mention in the will of the latter of an endowment for a chaplain, and it does not appear that there was, on that occasion, any other interposition of the royal authority than to legalize the gift.

What then was the condition of this place before the purchase by the Bishop? It must have stood on the common footing of all ground in and about *London*, which is not distinguished by any known appropriation, as part of the diocese of *London*. There is no suggestion to the contrary; since the whole argument is built upon the change, that is supposed to have been made by its becoming part of the diocese of *Ely*; and it is said, that it became thereby exempt from the ordinary jurisdic-

* See *Bentham's* Church of Ely, p. 151, 153.; also *Godwin*, de Præsulibus " Episcop. Elien."

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tion of the Bishop of *London*. But that is to speak improperly, since there was no special exemption from *London*, only as every other part of *Ely*, or as any part of one diocese is exempt from another. There was no special exemption, as in the nature of a peculiar jurisdiction. And here I must observe, that a fact has been adverted to in the answers in a manner rather incautious: It was pleaded, "that the chapel was immemorially a part of the diocese of *Ely*," and this is admitted in the answers in the terms of the allegation, though the fact is otherwise, and open to observation on the first enquiry, that it was no part of the diocese of *Ely* till a century after legal memory, which is fixed at 1189. This is an oversight of which advantage has been taken in argument; and if Dr. *Barton* was the only person concerned, he might have no reason to complain that advantage should be so taken of his admission. But as other parties are concerned, I think I am warranted to assert against this admission, that it did not become part of the see of *Ely* till after the time of legal memory.

The next consideration is, by what law, or on what tenure, it became a part of that see. I conceive, by the ancient law, that Bishops should be empowered to act in their *London* houses as in their Dioceses; and for that purpose their residences in *London* were considered as part of their Dioceses. We collect this from what is stated by Bishop *Gibson* *, and from the statute 33 *H.* 8. c. 31., relating to the bishopric of *Chester*, where it is provided "that he shall be held resident in the diocese of *Chester*, and have jurisdiction in his

* Cod. p. 132 n.

house

BARTON *v.* WELLS.

17th *Nov.* 1789.

house at *Weston*, within the diocese of *Coventry* and *Litchfield*, during his abode there, as other Bishops have in the houses belonging to their sees, wheresoever they lie." It is said, that this is only a private act,—and it is so in its enactments, but it gives a general description of the Bishop's jurisdiction in such places. It refers to a rule of law which was going into desuetude; and in the statute 31 *H.* 8., relative to the exchange of houses between the Bishops of *Carlisle* and *Rochester* and the Lord *Russell*, there is a clause providing "that they should have the same authority in their new houses at *Lambeth* and *Chiswick* as they had exercised in their old houses;" and *Gibson* says, that at the time when he wrote "there were none left but *Lambeth* House and *Croydon*, belonging to the Archbishop of *Canterbury*; *Winchester Place*, now removed from *Southwark* to *Chelsea*; and *Ely* House in *Holborn* *." The same privilege has not been attached to new houses, and is not annexed to the present *Ely* House, though a visitatorial jurisdiction is allowed in it by statute. †

It is made a question, what was the nature of the authority allowed, whether voluntary or contentious; but I see no reason to limit that privilege in the present case; though it is certain, that by the old canon law ‡, it is laid down as a rule, that one Bishop could not exercise jurisdiction in another Diocese,

* Cod. p. 132 n.

† The act 12 *G.* 3. c. 43. provides that the Bishop may continue to exercise his appellate jurisdiction, as visitor of certain colleges in *Cambridge*; and also directs that payment of the reserved rents belonging to his see may be made in the new episcopal residence, *Ely* House, *Dover Street.*

‡ X. 1. 30. 7. Vide, Gloss "Terminos."

even

even with the consent of the other Bishop, "*nisi* "*cognosceret inter volentes.*" The objection from the statute of citations* is not material; since, in such instances, there would not be a going out of the Diocese more than in the case of detached districts, and I see no reason to presume that the Bishop might not have held a Court of Audience or Consistory Court in such places, though it was seldom done.

Another question is raised, whether the ancient jurisdiction remained concurrent, or was excluded or removed.—In the older editions of *Ecton*, I perceive that *Ely* Chapel is classed in *London;* and it is more consonant to general principle that it should be so, than that it should have become absolutely and exclusively a part of *Ely*.

Such being the ancient law and usage, is it to be inferred, in reason or in fact, that a place so becoming part of the new Diocese, is thereby *irrevocably* detached from the ancient Diocese? The intention of the rule was to protect the Bishop from the penalty of non-residence†, and to provide for the necessities of his Diocese, by enabling him to perform the duties of it when called away by public business. Suppose the first Bishop, *Kirby*, had soon quitted this residence, on both reasons he would have carried the privilege to his new house. In such a case, on what ground could the person who might succeed him, not being Bishop of *Ely*, claim jurisdiction, on any principle of security to himself, or grounds of public convenience? Suppose the

* 23 *H.* 8. c. 9.

† *Burn*, Eccl. Law, vol. i. p. 213. *Watson's* Clergyman's Law, c. 37. p. 368.

same

BARTON v. WELLS.

17th *Nov.* 1789.

same of Bishop *De Luda*, or his immediate successors. If the privilege would not have remained attached to the house when they left it, then it can only be by the effect of time, as it is contended, that the personal privilege is now become local. But how is this proved? It is only said, that time has done so in other cases, and *that* in detached parts of Counties. The history of that fact however is subject to much obscurity and doubt, and even taking it to be true and certain, is accounted for on other principles. When Counts, having hereditary Counties, had also manors elsewhere, it is *supposed* that they obtained permission of the Crown, that the detached manors should be parts of their Counties. But there is no general principle, that is known to have prevailed at any time, that the demesne lands of an Earl should, during his residence there, be deemed appendant to his County; and it is most probable, that it was by special grant that such peculiar exceptions were established. But supposing such grants were obtained, they became under such grants local; and succeeding Earls could not, by changing such manors, affect their local character, and cause their new demesnes to be considered in the County where situated, whilst the antient ones lost that character.

With respect to Bishops, the origin of their privilege was very different, as it was principally founded on the ancient rule that their residence should be within their Diocese. The cause and the nature of their privilege was personal; and in the several instances which are mentioned in the acts of parliament, it is not to be doubted that they had all Oratories consecrated, and probably by them-

 selves,

selves, for divine service; yet there has been no claim of local exemption for these. It is truly said, that if others have relinquished such privileges, it cannot affect the rights of those who wish to retain them, but it is some presumption against such a claim, that no one having the same ground of pretension has made the same claim, particularly in a case of privilege, which is seldom given up, even when it is burdensome. Is there any privilege in this case *then* which distinguishes it from others? It is said that these possessions of the see of *Ely* were large and of great importance: taking the fact as so represented, it could not make any legal difference. It is said also that *Ely* House was part of the diocese of *Ely*, but others not; the contrary is proved by the act of parliament referred to; and it is impossible to shew *Ely* House to have been part of the Diocese of *Ely*, in any other manner than other houses of the same description belonging to other Dioceses. It is then contended, that the conveyance by act of parliament to the Crown, and the grant founded upon it, have produced a stronger effect. As an actual conveyance it would be no more than any other conveyance in extent of powers, and if, before the act, this house had been like other houses of the same kind, it must remain so, unless the act had expressly made it otherwise, which it does not appear to have done.

I am next to consider what was the more modern state and condition of this chapel. During the sitting of Parliament, service was performed in it, which marks the use of the chapel to have been for the private convenience of the Bishop, and of him only. It is not suggested that it was open at other times to other persons. But it is said that strangers were admitted,

BARTON v. WELLS.

17th Nov. 1789.

admitted, and very probably—by indulgence, *as* they may be admitted at the *Foundling Hospital*, or other places. It is said "that marriages were celebrated there as at the *Fleet*," but this practice ceased after the Marriage Act, which implies that it was not a regular and established place for the performance of that rite. Baptisms also of children born in the demesnes have been administered there; but that might be by permission of the Bishop, and would not furnish any proof of the particular character of the place. *

12 G. 3. c. 43. But the effect of the statute is relied on, by which this palace was transferred to the Crown, "with all rights, immunities, and advantages."—But what were the advantages connected with this question, that belonged to *Ely* House? I know of none belonging to the house, exclusive of the Bishop. As respecting the Bishop, the personal privilege belonging to him was, that his residence should be part of the diocese of *Ely*, and as such exempt from the jurisdiction of the Bishop of *London*. In what character then is the Crown to take? *as* part of the diocese of *Ely*? if not, it takes one part of the privilege, and not the other part. It has been said that the King would hold it as the Bishop had held—The Bishop held it *as part of the Diocese of Ely*, but the King is to hold as part of *no* Diocese, though no moment can be pointed out, when one part of the exemption subsisted not accompanied by the other; it was exempt from the ancient Diocese, only, as having become a part and appendage of another. The statute gives all rights, immunities, and advantages; but it transfers no portion of episcopal

* X. 3. 49. 9. *Gib.* Cod. p. 190.

rights

Barton v. Wells.

17th Nov. 1789.

rights. The privilege had been that this place should be considered as part of the see of *Ely*—all other consequences were dependant on that. If they are now to be transferred to the holder, without any connection with the see, it must come to this, that the privilege having been first personal, in the Bishop of *Ely, as Bishop of Ely*, has become a local privilege in a person to whom no such character belongs. Nothing arises from the possession of the Crown, as the King may hold places exempt, and others which are *not* so. The ancient demesnes of the Crown were exempt as *terra regis*; but in more modern possessions of the Crown, the Crown holds them as the former owner, and as parts of the same Diocese, unless its connection with that Diocese, as in this case, is derived from the mere personal and peculiar character of the former possessor. The result then is, that this place became part of the diocese of *Ely* by occupancy of the Bishop only, having been before part of the diocese of *London*; that occupancy ceasing, it falls back to its former relations: and if it is asked, how the Bishop of *London*'s right attaches under the act? I answer,—by instant resumption; and the question is, whether the act has taken away such right, and given it elsewhere, in derogation of the ancient right?

It is well known that great part of the possessions of the see of *Ely* were taken away by violence in the time of Queen *Elizabeth*, and given to Lord *Hatton*, and that there were many Chancery suits respecting them, which were not terminated until 1707 *. Many streets have been built there, yet no notion has ever

* *Grose*'s Antiq. vol. 3. p. 135.

been

BARTON v. WELLS.

17th Nov. 1789.

been entertained that persons residing in them should apply to the Consistory of *Ely*; on the contrary, they have always obeyed the citations of this Court; and if those parts have sunk into the diocese of *London*, why should not the rest of the same possessions? It is true, that this part came to the Crown, but what is the effect of that? That the Crown might erect this into a free chapel, I will not absolutely deny; but I am not satisfied that though the Crown may erect a free chapel on its ancient demesnes, it can therefore cut out a part of an old Diocese for that purpose. But if the Crown could exercise such a power, there is no proof that It has so done. There is no grant, no erection, no act of the Crown, that can be alleged to have produced any such effect. The Crown then took as any *subject* would have taken; and he could only hold, as he would have done before the occupancy of the Bishop of *Ely*. The place would not have become *extra-diocesan* on coming to a subject.

Something has been said of the ecclesiastical character of the Crown, that it may possess ecclesiastical jurisdiction, and transfer it to others. But the same question recurs, Has the Crown exercised any ecclesiastical jurisdiction, or has it transferred it? There is no proof of any such fact. It is said also, suppose a Bishop of another Diocese had taken, what would have been the consequence? If the old rule, on which the personal privilege of the Bishop was founded, has become extinct, as I think it has, he would not have succeeded to this privilege, more than any other individual; or if the rule can be shewn to be still in existence, the place would have become part of his Diocese, by virtue of his own

personal

personal privilege, but not as derived in any manner from the Bishop of *Ely*. But it is not so with the Crown: for there is no such rule, that a house purchased by the Crown, becomes, in perpetuity, part of any ecclesiastical jurisdiction belonging to the Crown.

BARTON *v.* WELLS.

17th *Nov.* 1789.

It is said, that the place having been consecrated is inapplicable to other purposes, and that the present proprietor having purchased it as a place of religious use, must have such use of it. That it has been consecrated may be an indifferent circumstance as to any question of jurisdiction, but it may furnish a good reason of expediency, why this chapel should not be exempt from the jurisdiction of the Bishop of *London*, since no other can be shewn, and it is impossible to foresee into what hands it may come, and to what uses * it may be converted, unless subject to some jurisdiction. Admitting that the purchaser had a right to the religious use of the chapel, he must admit also that he is subject to the direction of the law; since the right to religious use no more excludes the Ordinary, than the right of the parishioners to the parish church. Some observations have been founded on a trial at law, in which it is said, that *Ely Place* has been determined to be extra-parochial, in a suit for parish-rates. The *extra-parochiality* is not proved in this case;—but I will go as far as the allegation of the parties.—Supposing the jury, on a question concerning an assessment to the poor of *Saint Andrew, Holborn*, had been of opinion it was extra-

* The chapel is still in existence, and used as a place of divine worship for the children of the National School in *Baldwin's Gardens*; having been presented in 1819, by Mr. *Joshua Watson*, as a private benefaction, to that establishment.

parochial,

BARTON *v.* WELLS.

17th *Nov.* 1789.

parochial,—that the place may be so, and not extra-diocesan, is not to be denied.—Poor rates were first established in 43 Eliz.: Their allegation states, that it was *then* part of the Diocese of *Ely*. Dr. *Wells* appears also to have applied to the Bishop of *Ely* for his licence, acknowledging the necessity both of a licence, and of a dependance on some Diocese, and if it may be dependant on one episcopal jurisdiction, it may on another, and if any licence be necessary, the rights of the proprietor are not more injured by application to one Diocesan than to another.

The claim of total independence cannot be supported:—First, it is against the general law: Secondly, it is the claim of a layman to a privilege now extinct in the Bishops, to whose episcopal character it belonged: Thirdly, it is a claim of local privilege, whereas it was merely personal, and was confined to the residence of the Bishop. I must therefore pronounce for the jurisdiction of the Bishop of *London*, by decreeing that Dr. *Wells* has officiated without authority, and direct a monition to issue to him to desist.

On the question of costs, in a suit of this kind, according to the principle of the Court, some costs must be given; but it would be little less than injustice to give real costs; there is nothing positively criminal in the suit, as it could not be expected that the proprietor should resign a claim of this kind without submitting the question to the decision of the Court. That has been properly done, and upon a discussion attended with many difficulties. I shall therefore give a sum *nomine expensarum*, and fix that sum at 40*s*.

EVANS *v.* EVANS.

2d *July* 1790.

Divorce by reason of cruelty.—What circumstances constitute cruelty in construction of law. Dismissed.

THIS was a case of divorce, by reason of cruelty, instituted by Mrs. *Evans* against her Husband.

JUDGMENT.

Sir *William Scott.*—This cause has been carefully instructed* with evidence by the practisers, who have had the conduct of it; and has been very elaborately argued by the counsel on both sides. It now devolves upon me to pronounce the legal result of the evidence, which has been thus collected, and of the arguments raised upon that evidence—a duty heavy in itself, from the quantity and the weight of the matter; and extremely painful, from the nature and tendency of a great part of it, and from the inefficacy of this Court to give relief adequate to the wishes of both parties. Heavy and painful as it is, it is a duty which *must* be discharged; and which can only be discharged with satisfaction under a consciousness, that it is discharged with attention and impartiality, and under the reflection, that if, after the endeavours, which I have used in cleansing and in instructing my own conscience upon the subject, I should have taken what may be deemed an undue impression of the case, the laws of this country have not been deficient in providing a mode, by which the parties may be relieved against the infirmities of my judgment.

The humanity of the Court has been loudly and repeatedly invoked. Humanity is the second

* There were several pleadings, and one in exception to witnesses, on which the observations of the Court will be introduced, as a note, in the latter part of this case.

 virtue

EVANS v. EVANS.

2d *July* 1790.

virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Every body must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the *first* feelings of an individual. The law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons, which the law approves, and it is my duty to see whether those reasons exist in the present case.

To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to shew that the law in this respect has acted with its usual wisdom and humanity, with that true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases, the repugnance of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties

ties

Evans v. Evans.

2d July 1790.

ties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.

That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, *What is cruelty?* In the present case it is hardly necessary for me to define it; because the facts here complained of are such, as fall within the most restricted definition of cruelty; they affect not only the comfort, but they affect the health, and even the life of the party. I shall therefore decline the task of laying down a direct definition. This however must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage, which are secondary both in commencement and in obligation; but what falls short of this is with great caution to be admitted. The rule of "*per quod consortium amittitur*" is but an inadequate test; for it still remains to be enquired, what conduct ought to produce that effect? whether the *consortium* is

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EVANS v. EVANS.

2d *July* 1790.

reasonably lost? and whether the party quitting has not too hastily abandoned the *consortium*?

What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty; they are high moral offences in the marriage-state undoubtedly, not innocent surely in any state of life, but still they are not that cruelty against which the law can relieve. Under such misconduct of either of the parties, for it may exist on the one side as well as on the other, the suffering party must bear in some degree the consequences of an injudicious connection; must subdue by decent resistance or by prudent conciliation; and if this cannot be done, both must suffer in silence. And if it be complained that by this inactivity of the Courts much injustice may be suffered, and much misery produced, the answer is, that Courts of Justice do not pretend to furnish cures for all the miseries of human life. They redress or punish gross violations of duty, but they go no farther; they cannot make men virtuous: and, as the happiness of the world depends upon its virtue, there may be much unhappiness in it which human laws cannot undertake to remove.

Still less is it cruelty, where it wounds not the natural feelings, but the acquired feelings arising from particular rank and situation; for the Court has no scale of sensibilities, by which it can gauge the quantum of injury done and felt; and therefore, though the Court will not absolutely exclude considerations of that sort, where they are stated merely

Evans v. Evans.

2d July 1790.

merely as matter of aggravation, yet they cannot constitute cruelty where it would not otherwise have existed: of course, the denial of little indulgences and particular accommodations, which the delicacy of the world is apt to number amongst its necessaries, is not cruelty. It may, to be sure, be a harsh thing to refuse the use of a carriage, or the use of a servant; it may in many cases be extremely unhandsome, extremely disgraceful to the character of the husband; but the Ecclesiastical Court does not look to such matters: the great ends of marriage may very well be carried on without them; and if people will quarrel about such matters, and which they certainly may do in many cases with a great deal of acrimony, and sometimes with much reason, they yet must decide such matters as well as they can in their own domestic *forum*.

These are negative descriptions of cruelty; they shew only what is *not* cruelty, and are yet perhaps the safest definitions which can be given under the infinite variety of possible cases that may come before the Court. But if it were at all necessary to lay down an affirmative rule, I take it that the rule cited by Dr. *Bever* from *Clarke*, and the other books of practice, is a good general outline of the canon law, the law of this country, upon this subject. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health, is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It

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EVANS *v.* EVANS.

2d *July* 1790.

has been always jealous of the inconvenience of departing from it, and I have heard no one case cited, in which the Court has granted a divorce without proof given of a *reasonable apprehension* of bodily hurt. I say an *apprehension*, because assuredly the Court is not to wait till the hurt is actually done; but the apprehension must be *reasonable*: it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind. Petty vexations applied to such a constitution of mind may certainly in time wear out the animal machine, but still they are not cases of legal relief; people must relieve themselves as well as they can by prudent resistance—by calling in the succours of religion and the consolation of friends; but the aid of Courts is not to be resorted to in such cases with any effect.

The parties in this case are a Mr. and Mrs. *Evans*, proceeding in a cause of cruelty brought by Mrs. *Evans* against her husband.

The libel states the marriage at *Calcutta*, in the *East Indies*, in the year 1778; and it proceeds to plead the character of the parties; *that he is a person morose, sullen, tyrannical*, and so on; and that *she is in every respect the reverse, a woman of a mild and tender disposition.* These pictures are reversed, as is the usual manner, in the responsive allegation. It is usual, in these sorts of causes, to admit articles pleading in this manner the characters of the respective parties; it is usual, I say, to *admit* such articles, but I have not understood that it is usual to examine upon them, or at least to examine upon them in the proportion which has been done in the present cause. And I think, that I feel the weight of some reasons which would

would induce me very much to question the propriety of *admitting* such articles at all, if they were likely, in other cases, to lead to the consequences they have done in this; for a very great part of this voluminous enquiry has turned, not upon the matter in issue in the present cause, but upon the general character of the two parties; and I have been loudly called upon, on both sides, to determine *that* which I am not called upon, either by the nature of the authority which I possess, or by the necessity of the present case, to pronounce, —the result of that evidence upon general character.

Upon evidence of this kind it is impossible not to remark, that it is unsatisfactory in the extreme; it is *opinion* at best; the opinion of persons whose powers of judging upon any question of delicacy and importance are utterly unknown to me; whose partialities and prejudices, to colour and influence those opinions, are equally unknown to me. To take such opinions then, and to apply them to the proof of *controverted facts*, and those facts too of a criminal nature, does seem to be extremely unsafe. The case indeed is *civil*, as has been repeatedly observed, but the facts undoubtedly are criminal; or else why plead the bad disposition of the husband? why plead it, except for the purpose of shewing that he has committed bad acts? Now I know hardly any case, in which it is allowed to create a presumption in favour of the probability of criminal facts having been done, where that presumption is founded upon the mere opinions of men concerning general disposition. Criminal facts must be tried by themselves. To try them by opinions, and by opinions collected in

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Evans v. Evans.

2d *July* 1790.

this sort of way, is extremely dangerous for the Court: to the individual, who is exposed to an enquiry of this kind, it is dangerous in the extreme: to place a man in this sort of legal pillory, where all who choose may pelt at him, is exposing an individual to the injustice of mankind, in such a way, as I am sure the justice of Courts cannot relieve him from.

What I have to say upon this part of the case, therefore, will be extremely short, because it is merely a digression for the satisfaction of the parties; it is no foundation, no principle, no part of that legal proof, upon which I shall determine this case.

And I must here take the opportunity of saying, that if the truth of this charge rested upon matter of character alone, it would determine me very favourably in behalf of Mr. *Evans.* Here are the attestations of a great number of persons—gentlemen extremely respectable in their own characters and situations; connected with him by early and familiar acquaintance; by habits of a long intercourse; by habits of business. But all this, it is said, is the *partiality of friends.* What, is it nothing in a man's favour to have friends? Can a man say any thing that bears more strongly in his favour, than that he has friends? partial friends? friends who have become so, and can have become so, from the opinion only of his good deservings? They are persons, many of them, who have lived with him in a distant country, where countrymen collect together in close and intimate connection; *where they form,* as one of the witnesses describes it, *one community:* some of them, two of them in particular, have lived with him in the same family;

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EVANS v. EVANS. 2d *July* 1790.

in the family of Mr. *Hastings:* they have been connected with him in the conduct of business, where his temper was daily seen and daily tried; for business, as we all know, is very apt to expose the real dispositions of men: it is a tyrannical master; and if a man can go through the difficulties, which even the smoothest course of business will throw in his way, with an unruffled temper, it is no mean argument of a tractable disposition.

All this, it is said, may be very true; but it has happened in other cases, that a man has worn a mask to the public, and pulled it off to his family. Undoubtedly there may have been such cases; cases of moral prodigies; cases of disgraceful exception to the ordinary course of nature; but the general presumption at least is strong the other way. If a man shews upon all occasions an obliging disposition in his general intercourse with the world, the presumption certainly is, that he carries that disposition with him into the private recesses of his life. If he is a good friend, the probability is, that he is a good husband, which is a friend only of a nearer and dearer nature. It is to be added too, that in this case almost all the witnesses speak to this very specific part of Mr. *Evans's* character, even the witnesses who are examined on the part of Mrs. *Evans.* There are particularly Mr. *Wood,* Dr. *Curry, Tomlings,* with the exception of one fact, Mr. *Paumier,* Mr. *Griffiths,* Mr. *Boehm,* Mrs. *Webber,* with the exception of one fact likewise, all these witnesses, who are examined on the part of Mrs. *Evans,* bear an honourable testimony to his general and visible conduct.

Well, but it is said, there are witnesses who depose in a contrary manner, and you cannot reconcile

EVANS v. EVANS.

2d *July* 1790.

cile these two sets of witnesses together, but upon the supposition that what is said by the first set of witnesses is the effect of mere hypocritical assumption. Now the other witnesses, who depose unfavorably, with the exception of Mrs. *Hartle*, and a young *French* woman, Madame *Bobillier*, whom I shall speak of by and by, are Mr. and Mrs. *Thackeray*, and Mr. *Moore*. Mrs. *Moore* has not been examined in this cause, and the reason given for that has been, that she being the sister of the party, might be a witness whom the Court would hear with a great deal of jealousy and suspicion. Most assuredly the same circumstances of jealousy hang upon the characters of every one of these witnesses: they are all persons nearly allied; are subject of course to prejudice: I don't say to a dishonest or dishonorable prejudice, but from that circumstance they are subject to prejudice.

There is another observation that strikes me, and that is this, that all these witnesses, with the single exception of Mr. *Moore*, found their opinions upon the very facts controverted in the cause. Mr. *Thackeray*, who has given a very candid testimony in the cause, and on whom I shall very much rely in the determination of it, says expressly, "*that till some time after Mr. Evans's return to* "*England he had always a good opinion of him*," and he expressly founds his present opinion upon the facts that are now in issue between the parties. Then, only consider what is done in this case. In the first place, the witnesses extract their opinions from these particular facts, and then it is expected that the Court shall take those opinions and apply them to the establishment of the very facts in question. To be sure, if there is such a thing

thing as circularity in argument, this is that; and grosser injustice than that could not be committed. Mr. *Moore*, indeed, stands upon a very different footing, he goes back to a remoter opinion; his opinion does not arise out of the facts in issue; he refers to a much earlier period of time. Now there are one or two observations, which strike me pretty forcibly upon the testimony of Mr. *Moore*. Mr. *Moore* is a man of sense; he knows, I dare say, extremely well, that caution and that sobriety of mind, which belongs to a witness deposing in a Court of Justice to the character of another individual. And I am very sure he does not come here to amuse himself or the Court with drawing highly-finished pictures. I am therefore to suppose, as I do, that Mr. *Moore* is not only perfectly sincere, but that he rather falls short than exaggerates the impression upon his mind, in the character which he gives of this gentleman; That character is, "*That he became intimately*
"*acquainted with Mr. Evans, and was a good*
"*deal in his company, and saw much of him,*
"*prior to his marriage; that after his marriage*
"*until the month of April* 1780, *their families*
"*visited; but from the said month until the arrival*
"*of Mr. Evans in England, he had little or no inter-*
"*course with him; but that upon his said arrival,*
"*and for some time afterwards, he the deponent*
"*often saw and was a good deal in his company;*
"*and has at different periods prior to his marriage,*
"*when he was likely to become allied to the de-*
"*ponent's family, and until Mrs. Evans was obliged*
"*to quit his house, given a watching and scrutinizing*
"*eye over his conduct and disposition, and is there-*
"*by enabled to say that he knows him to be a man of*

"*wicked*

Evans v. Evans.

2d July 1790.

" *wicked, profligate, and abandoned principles, and of* " *a morose, tyrannical, cruel, and savage disposition,* " *void of common humanity, vindictive, full of ani-* " *mosity and revenge, of a turbulent and intolerable* " *temper, avaricious and mean to excess, a great* " *dissembler and hypocrite, filthy in his ideas, and* " *delighting in the dirty expression of them ; and so* " *much given to deceit, scandal, and falsehood, that,* " *from a very early period after his aforesaid mar-* " *riage, it was a rule in the deponent's family never* " *to believe what he said ; and that he, the deponent,* " *has often heard him scoff at the religion of the* " *church to which he was brought up or professed ;* " *that he has often heard him pride himself on his* " *apathy and callousness, and knows him to be of* " *callous feelings ; and that he had the character of* " *a morose, tyrannical, cruel master amongst his* " *native servants in India.*" And he concludes by pronouncing him, in another passage of his deposition, a person *unfit for admission into society.*

Now taking this character into consideration, I think there are circumstances in the conduct of Mr. *Moore* which are a little extraordinary. This young lady went over to *India* into the family and under the protection of Mr. *Moore ;* Mr. *Moore* was acting by her with the substituted authority of a parent ; he was perfectly acquainted with the detestable character of this gentleman ; it is a courtship which goes on for many months, as is proved by Mr. *Moore* himself, and yet it does happen that this poor young creature is suffered to fall into the hands of this monster. The marriage is graced by the presence of Mr. *Moore,* by the presence of some of the most respectable persons then resident in the

 country,

country, Mr. *Vansittart*, Mr. *Perring*, Sir *John D'Oyly*; an afflicting ceremony it undoubtedly must have been to Mr. *Moore*; it must, in fact, I am sure, have been considered by him literally as leading her to the altar to be sacrificed. It may be said, indeed, that this was an act of necessity on his part—Be it so: this however might have been expected from a brother's affection and attention, for a brother he certainly has shewn himself throughout this business, that he would at least have taken the most early opportunities of acquainting the other parts of his family with this great misfortune which had happened to it. Mr. *Thackeray*, Mrs. *Thackeray*, and every member of the family in *England*, must have been informed by him, if it was only for the security of this poor unhappy young woman, who was so sacrificed, that she was in the hands of one of the most detestable of mankind. Yet nothing is more clear to me than that nothing of this sort ever was communicated, otherwise Mr. *Thackeray* could not have deposed that he continued *his good opinion of* Mr. *Evans till after his arrival in England*. It is impossible, therefore, that it could have been communicated to Mr. *Thackeray*, or in short to any one of the family. I think, therefore, I have, in this case, Mr. *Moore's* deposition speaking one way, and Mr. *Moore's* conduct speaking another; and, where they speak different ways, I know which I have to trust to. I have only one way of conceiving the matter, and that is this; his present opinion is sincere, but it is only his present opinion; he has not cautiously watched the rise of it in his mind; he is inaccurate in tracing back its commencement to the period that he does: it is not,

Evans v. Evans.

2d July 1790.

not, as he supposes, the fruit of early and dispassionate observation; it is the fruit of passion, of modern passion, produced by the resentments excited by the later dissensions in this family.

Upon the whole, then, I see most honourable attestations to the character of Mr. *Evans*; and I think I have reason to presume, that if late dissensions had not happened, I should have seen no attestations but such as were perfectly honourable to his character.

On the character of Mrs. *Evans* I shall say much less; for this reason—because it is much less connected with the issue in the cause; because, if the facts imputed to Mr. *Evans* are false, there is an end of the question. On the contrary, if they are true, they are of that nature and species, that they cannot be justified by any misconduct on the part of Mrs. *Evans*; for though misconduct may authorize a husband in restraining a wife of her personal liberty, yet no misconduct of hers could authorize him in occasioning a premature delivery, or refusing her the use of common air. In every view therefore of the matter, Mrs. *Evans*'s character has nothing to do with the cause; and in a cause where so much is to be said upon the necessary parts, I shall waste but few words upon such as are unnecessary and altogether impertinent to the cause. The little that I have to say, is for the satisfaction of the parties; and it is this, that here again, if the matter rested simply upon the evidence given of character, yet after all the unhappy pains which have been taken to blacken each other, I see no reason why these two persons might not have passed through the world comfortably together, with a little discretion and management on their

their own side, and some discretion and management on the part of those who are mutually connected with them. To be sure, if people come together in marriage with the extravagant expectations that all are to be halcyon days, the husband conceiving that all is to be authority with him, and the wife, that all is to be accommodation to her, every body sees how that must end: but if they come together with the reflection, that, not bringing perfection in themselves, they have no right to expect it on the other side; that having respectively many infirmities of their own to be overlooked, they must overlook the infirmities of each other; then, if friends will be discreet enough to support them in the execution of their duty, there is a high probability that something like happiness might be produced.

With respect to Mrs. *Evans*, there are many attestations much too honourable to be applied to any character that was unamiable, and these too come from witnesses examined for Mr. *Evans*. What bears a contrary aspect, seems to have come at a later period, when dissensions had arisen, when servants and friends had entered into the factions of the family, had taken sides, and had, of course, a bias hung upon their judgments. But what I principally rest upon, is the testimony of early acquaintance — of acquaintance before hostilities commenced — of Mr. *Hannay*, Mr. *Maxwell*, Mr. *Halhed*, and others. Such persons, I think, must form a safer judgment than Mr. *Mason*, much of whose judgment, in all probability, is formed upon the complaints of the husband. I think the attachment of her family, the zealous and animated part which they have taken in her behalf on this

 occasion,

EVANS v. EVANS.

2d July 1790.

occasion, speaks strongly in her favour; and I do assent to the observation that has been made, that if she had been the worthless person she is represented, they would not have stood forward in the manner they have done.

There is one odious imputation in the cause, which I have heard with great pain, and to which I advert with great reluctance, and it is merely for the purpose of saying, that I think it an imputation unfounded and ill-advised; and I can never give way to it upon the evidence that has been given. The appearances of a woman affected by nervous disorders, in a way in which this poor lady, it is in proof, was often affected, are equivocal enough to mislead a stranger, as Mr. *Mason* appears very much to have been; and as to the servant *Fraser*, *the facts* themselves are so trifling to which he speaks, that they *amount to little;* and when I reflect upon the licence of observation exercised by people of this kind upon the conduct of their masters and mistresses, I must consider it as amounting to nothing. I have then no evidence before me on which it is possible to suppose that the character of this lady is at all polluted by so degrading a habit.

So much, then, for matter of character in this cause; which part of it I now gladly leave, to come to the real subject of the cause,—the conduct of Mr. *Evans* towards his wife; and, in order to examine that, I must look back a little into their history.

Mr. *Evans* went to the *East Indies*, I think, in the year 1770; he was employed in the usual occupation of gentlemen who resort to that country,—in making or improving his fortune. He

was

was in the immediate service of Mr. *Hastings*, the then governor-general. In 1776, Miss *Webb*, the daughter of a respectable person in His Majesty's military service, went over to *Calcutta*, upon a visit to two sisters, who were married and resident there;—a Mrs. *Moore* and a Mrs. *Thackeray*. It appears, I think, that Mr. *Thackeray* and his wife were at this time resident with Mr. *Moore*, but that they left *Calcutta* before Miss *Webb* was settled in marriage. In *November* 1778, the marriage took place, after a courtship of some months, as I have already stated. At the time of the marriage, he made a settlement upon her, to which Sir *John D'Oyly* was a trustee; and Mr. *Boehm*, his agent in *England*, speaks to his belief, that this was a settlement to her sole and separate use. Mrs. *Evans* appears to have been of a delicate constitution, and the climate of *India* by no means agreed with her. It is proved by Sir *John D'Oyly* that she was often in fits in a very early period of the marriage,—that is what he expressly swears. Mr. *Maxwell* proves, that when she pressed a return to *England* upon her husband, it was stated that the climate of *India* did not agree with her. In other respects I see no reason to presume that the marriage was not as productive of mutual happiness as marriages usually are. Sir *John D'Oyly* swears expressly that she *at that time appeared very fond of him;* Mr. *Griffiths*, Mr. *Wood*, and several other witnesses, who are examined as to the character and conduct of the parties, and who lived in considerable habits of intimacy with them at that time, give me no reason whatever to suspect that any thing like unhappiness then subsisted between them; and all the witnesses, I think, who

 depose

EVANS v. EVANS.

2d *July* 1790.

depose to that period, speak with as little apprehension as to what has since happened as is possible.

In 1781, Mrs. *Evans* left India on account of her health. Mr. *Evans's* counsel have taken credit on account of his acquiescence in this separation. Now, this credit is denied, upon the ground that this acquiescence might have been merely for the purpose of getting rid of her. Why, to be sure, if his preceding conduct had been that of a disaffected husband, such a construction might have been fair enough; but if otherwise, it is rather hard to give such an interpretation to the very step which the most affectionate husband must have taken. Credit is taken likewise, by the counsel on behalf of Mr. *Evans*, that no cruelty is imputed to Mr. *Evans* at this time. It is answered, that though no cruelty is proved, yet there might have been acts of cruelty, which the prudence of the party, and a just regard to time and expence, have prevented her from now bringing forwards. It is within my recollection, and if it had not, I have been reminded of it, that in the original allegation given in this cause, she expressly pleaded, *that her original return to Europe was occasioned by his cruelty*. That assertion I directed to be struck out, because it was pleaded in a way so loose as to be incapable of proof, and therefore shewed that the party herself could have had no intention of proving it. It satisfies me, then, of this, that there was no disposition to suppress it, if it had been maintainable; because it is actually noticed in the cause. Taking then the whole together, I am supported by the testimony of all the witnesses, and I think I am also supported by what is full as good

good evidence, by Mrs. *Evans's* conduct in this suit, in saying, that no cruelty is at this period of time, her first departure for *Europe*, imputable to Mr. *Evans*.

She arrived in *England* in *October* 1781. She pursued the means of health, — by medical advice, — by travelling to different parts of *Europe*, — by proper amusement, — in all of which it is not denied; on the contrary, it is fully admitted, that she enjoyed the most liberal assistance from the fortune of Mr. *Evans*. It is proved by his agent, Mr. *Boehm*, that the expence during her residence in *England*, amounted to about £5600, which, by a calculation rather, I think, unfavourable, has been made to amount to near £2000 a year. This certainly is a large sum out of a fortune that was making, that was not yet made; — it was in fact so large as to alarm the friends of Mr. *Evans*, — and Mr. *Boehm* took a liberty, which I presume an agent does not often take, of remonstrating on account of the drafts. I think that in the deposition of Mr. *Thackeray*, notwithstanding he deposes with the guarded and discreet tenderness of a relation, it is yet very easy to see that he hints at something like profusion on the part of Mrs. *Evans*; — he says expressly, that she *was too generous, generous to a fault*, and a fault that undoubtedly is, because the province of a woman, in matters of liberality out of her husband's property, is certainly extremely limited. She may be the almoner of her husband, but in the disposal of his fortune she is under very great restrictions. There is one fact particularly mentioned, which is, the lending a large sum of money to a Captain *Barnwell*; and I own, that if I was to look sharp to find

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EVANS *v.* EVANS.

2d *July* 1790.

out the commencement of impropriety of conduct, I should be apt to say, that I think I see the first speck of impropriety here attaching upon the conduct of Mrs. *Evans*, and one sees the folly, the imprudence of such conduct, in the event of this, — for it *does* appear that this very Mr. *Barnwell*, to whom this money was lent, was the very first person to complain of her extravagance. It appears that Mr. *Evans* felt the impropriety of this, but he felt it in a way that an affectionate husband, a considerate man, would feel it; — he said to Mr. *Griffith*, that she had *spent a good deal of money*, but that *nothing gave him so much uneasiness in her expences, as the sum of money which she had lent to another person*. However, though this produced some dissatisfaction, it produced no rupture, — it was overlooked.

She sailed for *Calcutta* in *December* 1784,—she arrived in 1785, and there they remained until 1787. It is a little material to see what passed during this interval. They were visited by a Mr. *Wood*, a respectable person, who is examined as a witness on the part of Mrs. *Evans*. Mr. *Wood* does not give the slightest intimation of any disagreements in this family; on the contrary, he says, that his behaviour, *as far as he ever saw it, was studiously and affectionately tender*. Mr. *Maxwell*, a person who was almost domiciled in the house, who dined and supped there very frequently, and was often upon parties with them, speaks likewise of their *living upon terms of the greatest harmony imaginable*. Mr. *Griffith*, who was much in their company, *has no insinuation to the contrary* in the least. Mr. *Hannay*, who states himself to have been intimate, *never heard the most distant surmise*

that

that he treated her improperly. Mr. *Halhed,* and other witnesses, speak to the same effect.—Then, taking the whole of this evidence one way, it is certainly evidence extremely strong; and if to this we add the total absence of all evidence the other way, I think myself warranted to say, that Mr. *Evans*'s behaviour, up to this period, was in every respect unexceptionable.

Two facts, in particular, appear, which it is impossible not to notice;—one is upon the evidence of Mr. *Maxwell*—and that is of Mr. *Evans*'s going up into the country, at a distance from *Calcutta,* to *Moorshedabad* I think, or some other place, on account of her health. It may be said, there is no merit in that, any husband who had a sick wife would do as much; but, it must be allowed, she might have gone by herself: at any rate, therefore, there is great attention shewn in this instance of his personal attendance.

The next fact, and a very material fact it is in the cause, is this,—that, purely to gratify her wishes, and to consult her health, he quitted *India:* a country where he was almost naturalized, and where his prospects of avarice and ambition, at that period of time, were extremely inviting. He was then, as Mr. *Maxwell* says, *a senior merchant.* But, say the gentlemen, there is no great merit in that, *he had got enough.* There is surely some merit in knowing that; it is a merit every body does not acquire; it is a proof of moderation, at least; and that he is not the *mean and avaricious person* which he has been represented to be: and, supposing he was that mean and avaricious person, still there is the more relative merit towards Mrs. *Evans,* because, if he was a man extremely

Evans *v.* Evans.

2d *July* 1790.

fond of his money, and yet gave up his money on account of his wife, it is hard to say that he had not some degree of fondness for his wife. Well, but, say the gentlemen, his reputation was concerned. How so? She had already shewn that she could come to *Europe* without his personal attendance. I shall not then diminish the merit of so good an action, nor suffer it to be diminished, merely because it happens at the same time to be, what every good action is, a reputable one.

I am clear, therefore, that up to the time of the voyage nothing material had happened to cloud the happiness of this family. The voyage itself; the application made for it by Mrs. *Evans*; the undertaking of this voyage by Mr. *Evans*,—are all a security to me that the fact was so; for, if he had been the savage tyrant that he is represented to have been, it is clear to me that she would never have ventured upon such a solicitation with any idea of success, and it is equally clear to me that she would never have succeeded in it. Till this time, therefore, I see in the conduct of Mr. *Evan* nothing to blame,—I see much to approve.

It is however upon this voyage, "*malâ ducit avi domum*," that a change of conduct in Mr. *Evans* is first suggested to have taken place. It is not very well agreed what this change was, whether it was an indulgence of ungovernable sallies of ill temper, or whether it was a cool systematic plan of distressing his wife, by the most atrocious ill usage: but certainly two things more inconsistent cannot be, than cool hypocrisy and wild passion. Now it is a strong presumption with me against the supposition of its being a case of ungovernable passions, that passions so inordinate appear to have

developed

developed themselves for the first time in the course of this voyage. If so, I think there must have been an alteration in the constitution of this man's mind; which is highly incredible. The material witnesses therefore resort to the other supposition. This is the turn given to his conduct by the great witness in this case—Mademoiselle *Bobillier*,—namely, that it was *a crafty command of his passions; that every thing that he did visibly, was studied for ostentation; and that his passions were kept for a secret operation when nobody was by.*

One cannot help observing, that taking it to be a cool deep-laid plan, to be pursued and carried into effect in a secret way; the scene for the execution of such a plan is as unhappily chosen as can be. Every body knows, that secrecy on board a ship is a thing not to be thought of. People cooped up in a ship live, and are forced to live, in that state of miserable intimacy, which makes almost every thing that is done or said, known to every other person: there is for a time, a very unhappy circumstance it is, almost a suspension of every thing like personal delicacy,—every word and every act is known to almost every body. Now to suppose that a man in such a situation should first think of opening a plan of secret violence, one must first suppose, not only that he left his temper in *India*, but that he had left his common sense with it.

There are three witnesses only who are examined on this part of the case: there is Mr. *Curry*, a Mr. *Humphry*, and a Mrs. *Hartle*. When the question is asked, Why other witnesses are not examined? the first answer is, That Mr. *White* is dead,

EVANS *v.* EVANS.

2d *July* 1790.

dead,—the second answer is,—That it is not more necessary to call witnesses on the one side than on the other: not to have called more, therefore, is, if any, an equal imputation on both parties. This latter answer might be some answer to the other party; might serve, in some degree, to stop their mouths, but it is no answer to the mind of the Court. In the next place, I say it is no satisfac-factory answer to the other party; because Mrs. *Evans* is the complainant, and she is the party who is bound to make out her case. But, to go farther, Is Mr. *White* the only witness who could have been adduced? Were there no other officers but Mr. *White* on board this ship? They have vouched indeed one female servant, and it is an extraordinary thing that there should not have been more female attendants, a little black girl, whom they represent as too stupid to be examined as a witness; but I find also two men-servants of Mr. *Evans*, who are vouched in the case, and who are likewise mentioned both in the libel and in the depositions. They would surely have been most important witnesses, if they had been produced; because they would have spoken a great deal to what has been described respecting the foul cloaths, delaying the breakfasts, and the nature of the several orders that were given to them by both the parties in this cause. However, it does happen, that the case is left utterly destitute of all the illustration, which it might have received from their important testimony.

Of the three persons actually examined, to be sure Mr. *Curry*, so far as situation and character are concerned, is extremely worthy of particular attention. He was a medical gentleman, who attended

tended this lady during the whole of the voyage; whenever she was ill, she was under his immediate care. He swears *that he saw her, and saw her in his professional capacity, every day during the whole of the voyage, three days only excepted, during which he himself was confined by indisposition.* It has been well said by the counsel for Mrs. *Evans*, that a medical person is a confidential person,—every thing affecting her health must unavoidably have come to his knowledge,—it could not have escaped him. He gives an enumeration of symptoms; he applies a blister, about which Mr. *Evans* differed in opinion; and I think this gentleman shews a sensibility, more than enough, about the honour of this blister. He has his own resentments against Mr. *Evans*, and he candidly states them; yet I still think I do see enough in his deposition to satisfy me, that, though he would not misrepresent nor exaggerate in the slightest degree, nothing that he knew of Mr. *Evans*'s conduct, to his disadvantage, would be either much softened or at all concealed.

EVANS v. EVANS.

2d *July* 1790.

Mr. *Humphry* was a fellow-passenger, but a witness of no particular intimacy whatever with either of the parties; I think he says, *that he was not in the cabin, in their particular apartment, during the whole of the voyage.* He gives his opinion of Mr. *Evans*'s temper and disposition; he thinks that it was *harsh and austere.* That, however, I am to take merely upon the credit of Mr. *Humphry*'s discernment, for he speaks to no facts whatever, and I must remark, that observations made upon a man's temper, upon the temper of a landsman, during a voyage of six months, ought not to be turned very strongly to his disadvantage; for every

EVANS v. EVANS.

2d *July* 1790.

every body knows that a voyage of that length is no very great sweetener of any man's disposition, during the time that it lasts.

Mrs. *Hartle* is a witness who appears to have lived in considerable intimacy with Mrs. *Evans*, but most clearly she lived upon very indifferent terms with Mr. *Evans*. She charges him with much personal incivility to herself during the voyage, and it appears that her resentments have since been sharpened by later indignities; so that she is, as Dr. *Arnold* has well described her, *a sort of co-plaintiff in the cause*. I am to consider her, therefore, as deposing under the double danger of having inducements to take very strong impressions of facts to Mr. *Evans*'s disadvantage, and of feeling no unwillingness to give such impressions their full force in representing them to the Court.

The facts agreed to by these three witnesses are these:—In the first place, that Mr. *Evans* had procured, at a great expence, the very best accommodations a gentleman of fortune can have in a passage from *India*. So far all agree. And, in the next place, it is agreed, that she had of those accommodations, as it was highly proper she should have, the best share. Two of these witnesses, Mr. *Humphry* and Dr. *Curry*, are totally ignorant of any quarrels or disagreements during the whole of the voyage. It is said, Mr. *Humphry* not being particularly intimate, his is merely a negative testimony;—however, for the reason that I have above stated, I think that a negative testimony, in such a case, is a very strong testimony; because it is not possible that any act of atrocious outrage could have happened on board this ship, without its travelling to the knowledge of most persons

persons on board. Dr. *Curry's* testimony is still stronger; his is not merely a negative testimony; he says, that, *as far as ever he observed, Mr. Evans's conduct was studiously affectionate.* Now, his ignorance seems to me still more irreconcileable with the notion of this ill usage; because, it seems hardly possible that it could have existed without coming to the knowledge of a person who attended this lady constantly upon the occasion of ill health. It is still more irreconcileable with the notion of its being a fact within the possession of any third person; because, though some secret ill usage might have passed between Mr. and Mrs. *Evans*, which was known only to themselves, and which, from a natural concern for their common reputation and quiet, they might not have divulged, yet it is very unlikely that if there were facts of outrage which got into the possession of a third person, that such facts should have rested there, and not have travelled farther.

There is, however, a third person on board this ship, Mrs. *Hartle*, who undoubtedly differs widely from both these witnesses, and upon her single testimony, the single testimony of an ardent witness, inflamed with resentments of her own, I am to take these facts, contradicted, as they are, by the silence, by the emphatical silence, of the two other witnesses: facts of a nature so atrocious, that they certainly have but little probability to support them, which can be founded on any argument arising from the general disposition of mankind, and which, from what I have stated in this particular instance, had no probability whatever, which is founded in the antecedent conduct of this gentleman.

The

EVANS v. EVANS.

2d *July* 1790.

The first fact which I shall observe upon is that most atrocious fact which is mentioned in the libel, article 6; "*That during the passage, Mrs. Evans being in a very low and bad state of health, and fresh air being absolutely necessary for her, Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, a door to be kept open, or even opened at all, except when he wanted to pass in or out; that at the times he refused the benefit of the air to his said wife, he was not able to stay in the cabin himself during the exclusion of the air, but always retired to his own cabin, or some other part of the ship: and that once, when Mrs. Evans attempted to open the door to admit the air, she was prevented by Mr. Evans, who, with savage fierceness, seized her by both her arms, and, in great rage, with his utmost force and violence, threw her down three times, alternately raising her for that purpose upon some earthen guglets, or vessels used for cooling water, and thereby very much hurt and bruised her, put her to great pain and anguish, and increased her illness.*"

The account given by Mrs. *Hartle* of this transaction, shews that even this account given in the libel is not at all overcharged. What she says is, "*That one morning, in their passage to St. Helena, the deponent and Mrs. Evans were in Mrs. Evans's room, walking towards Mr. Evans's room; that they observed him sitting there; that seeing them approach, he got up, and immediately went to and shut the door of the cuddy; that they were then under the Line, and there was not a breath of air stirring, and this deponent was extremely faint.*" So that in fact the cruelty stated seems to be a cruelty that rather attached upon the witness than the party, and so indeed

indeed Mrs. *Evans* represents it; for her application, according to Mrs. *Hartle*'s testimony, is this: "*Do, Mr. Evans, let us have the door open,—Mrs. Hartle is ready to faint.*" She then goes on to say, that "*Mrs. Evans then went towards and proceeded to open the door; that Mr. Evans, who was sitting with his legs up in an easy kind of posture, and was reading, then got up, and with a savage fierceness laid hold of both her arms, and then with violence threw her down, and she fell upon some earthen guglets for holding water, which stood close by the said door; and lifting her up again by her arms, with equal violence threw her down on the said earthen guglets; and she the deponent thought that by means thereof she was almost killed; and being greatly terrified thereat, went out to send the black girl to her assistance; that on going out she heard a noise, as if Mrs. Evans was falling a third time; that she returned into the cabin, and found her sitting in a chair, her whole frame appearing convulsed, and her face quite pale; that the deponent observed grasps of fingers on her arms, which appeared black and blue, and that the deponent had not before observed such appearances on her said arms, and they appeared in parts of which Mr. Evans took hold, and, as she is well convinced, were occasioned by him; that the said Mr. Evans, on his so throwing the said Mrs. Evans down, appeared in a very great rage, and he extended his mouth, and clenched his teeth in a revengeful manner, and his countenance quite changed with anger; and that the said Mrs. Evans appeared very ill and low for many days afterwards.*"

This, indeed, is such an act, that one can hardly find an epithet to give it its due character. It is, as

EVANS *v.* EVANS.

2d *July* 1790.

as has been said, a demi-murder, a murder more than half executed. It is an act not to be excused upon any sally of passion; that a man, on so slight a provocation as this, should three times knock his wife down, a woman of very tender health, in the way that is here described, is an act that does go to the very full extent of what the law must deem to be matrimonial cruelty. It is a fact of that atrociousness, that a Court of criminal jurisdiction would pursue with the greatest vengeance, and I need not add, that the common indignation of mankind would follow it to the latest period of the life of the offender.

Mrs. *Hartle* I cannot upon any idea suppose to be a person who comes deliberately to misrepresent, nothing looks like that. She is totally unimpeached as to general character; therefore, *a priori*, there is no reason why she is not to be fully credited. However, it is a good safe rule in weighing evidence of a fact, which you cannot compare with any other evidence to the same fact, to compare it with the actual conduct of the persons who describe it. If their conduct is clearly such as upon their own shewing it could not have been, taking the fact in the way they have represented it, it is a pretty fair inference that the fact did not so happen. If their actings, at the very time that the fact happened, represent it one way, and their relation of it, at a great distance of time, represents it another way, there can be no doubt which is the authentic narrative, which is the naked truth of the matter. Now, in trying Mrs. *Hartle*'s narrative by that test, I think I do see enough to satisfy me that she has deposed, I do not mean to say without principle, but she has deposed with passion; and that this is a very grossly inflamed representation, produced

produced by repeated resentments, conceived partly on her own account, and partly on that of Mrs. *Evans*. *Evans v. Evans.* 2d *July* 1790.

What is the conduct that any person of common sense and of common humanity would have adopted, who had been present at such a scene of infamous brutality as this is? Why, a man, be his powers of body ever so weak, that had the common spirit and feelings of a man, would have interfered, without the least apprehension of personal consequences to himself: but here there is a lady present, a friend of the suffering party: Is it credible, that she should be present at such a transaction as this, without raising a general alarm?—Not to do so, for the purpose of obtaining assistance, is an act of brutality almost as brutal as the act itself: it is really being an accessary after the fact. Why, without reasoning upon it, mere instinct would have compelled her to do so. Now, what does she do? Does she apply to Mr. *White*? Does she apply to any officer? Does she apply to the surgeon? Does she apply to any one person who could have interfered with effect? There is not a man on board the ship, undoubtedly, who would not have lent a willing hand. Mr. *Evans* would have had good luck if he had not been voted into the sea, by general consent, upon such an occasion as this. Instead of this, what does she do? Why, she runs out, and sends in the little black girl, who, they tell me, at this moment is too stupid to be examined as a witness; she sends her in to rescue this poor lady from the hands of this tyrant, and thus discharges the office, it seems, of a good friend, of a good christian, and of a human being.

EVANS *v.* EVANS.

2d *July* 1790.

What is done afterwards? Her friend is extremely weakly,—is attended constantly by a medical person,—and, as she swears, *is made ill for many days in consequence of this treatment*; yet this lady does not communicate one syllable of the matter to the physician, who was so much concerned to know it, and whom she saw every day: he is in total ignorance of all that has passed.

The counsel on the part of Mrs. *Evans* have very properly reproached Mr. *Evans* with cruelty, for not having communicated to Mr. *Paumier* the unhappy habit of intoxication with which he has charged his wife. They say, it was his duty to have done it, as undoubtedly it was. Then, what am I to think of the conduct of Mrs. *Hartle* upon this occasion? She was a person who was certainly under no restraint from any partiality to the defendant; directly the reverse. It is a behaviour, in my apprehension, so totally unnatural under such circumstances, that I am satisfied such circumstances could not have existed. But what does she do when she comes to *England?* What would any body have done in such a case, with common reflection? Why, clearly, have advertised the family, not maliciously, but confidentially; would have put them upon their guard; would have told them, that, with all the speciousness of manners which this gentleman assumed, she had been witness to a scene of horror, which shewed him to be a most intolerable tyrant. Not a word of all this passes. She visits regularly, upon the invitation of this very gentleman, as if nothing extraordinary had happened, and the family remained perfectly uninformed. I rely for these facts upon the testimony of Mr. *Thackeray*; for, how is the con-

continuance of this gentleman's good opinion any way consistent with his knowledge of this fact? or, how is his ignorance of the fact consistent with the knowledge of it by any one of the family? I have all the reason in the world, therefore, to believe that the diclosure of this fact took place very recently before the commencement of this suit.

Let us now see the conduct of Mrs. *Evans* under all the pain, and all the terror, which such a situation must excite. No alarm is given by herself; yet in the account given by her of attacks made at other times, she pleads and proves that her piercing cries brought people from all parts of the house. Mere animal nature would have made its appeal to the ordinary feelings of other people: she *must* have done it; nobody could submit to be murdered in this sort of way, in silence. Yet I hear nothing of any cry of distress; it does not appear that a single person was collected by any expression of pain or suffering. She is equally silent before her coming to *England*: not a word to the physician in attendance; not a word upon her coming home to her own family. It is said, that all this was tender dissimulation for the character of her husband. That seems to me to be very hard to be conceived. I have been put in mind of Lady *Strathmore*'s Case, where a continued series of ill usage, for years together, was kept from the knowledge of every body, but three or four people: but then I must take along with me this fact, that the gentleman charged had taken every precaution to preclude a possibility of detection; for he had planted his own creatures about her: and the very first opportunity that she had

of

EVANS *v.* EVANS.

2d *July* 1790.

of disclosing her real situation, the business blew up immediately. There was, I remember, in this Court, the case of Mrs. *Prescott:* that was a case, to be sure, of a person who had suffered as atrocious ill-treatment as one human being can receive from another, and she bore it with great, with wonderful resignation. But this was proved in that case, that she did not keep it entirely unknown to others; she implored the protection of her father, whenever she was ill-treated; she communicated it to medical persons; not a word of harshness in the style of her complaint; her complaint to the Court was conceived in strong language, but it was in language more expressive of sorrow than of anger: but still there was no dissimulation. Now, I do not conceive that Mrs. *Evans* would have been less prompt to complain than Mrs. *Prescott* was. I have looked into the libel in the present case, which certainly does appear to me to be drawn with sufficient acrimony; I have looked into the personal answers, and I cannot help saying, that these personal answers are written with full as much passion as prudence: I do not see in these answers the marks of that perfect resignation which is so much contended for. I do not mean to say, Mrs. *Evans* appears in her conduct in this suit, or in any paper produced, to be a person who would assert her rights improperly; but I do say this, that she appears to me to be a person who would not dissemble her injuries in a way beyond all example, beyond all propriety, and all reason.

Then, taking the fact upon this view of it, I feel no hesitation in saying, that what I collect is this:—That there was something of a struggle, how

how arising I don't know, but it was a struggle of no consequences; and that is the important point. If it had drawn consequences after it, there must have been other witnesses, and the witness who was there would have acted otherwise. It must have been therefore a trifle, and in being coloured as a matter of importance it has received an undue colour; the basis of the fact is extremely slight, and all beyond it is colour—is exaggeration—is passion.

Evans v. Evans.

2d July 1790.

Having disposed of this great leading fact in the voyage, I shall dispatch in fewer words the other facts which are charged: in the first place, because they are, compared with this fact, very slight; in the next place, because they stand upon the single testimony of Mrs. *Hartle*, who, in my opinion, has taken a very undue and extravagant impression of the whole business.

There is another charge, which is so strong a proof of this, that I shall notice it for no other purpose, than to exemplify the strong bias of this witness to make mountains of mole-hills. I mean her evidence upon that article which charges the business of the noises. It is pleaded, *that while Mrs. Evans was in a very weak and sickly state, Mr. Evans accustomed himself, in the most unfeeling and cruel manner, to distress her and increase her pain, by making a violent noise with a hammer close to her.*

I had very great doubts about admitting this article. I admitted it upon an idea suggested naturally enough by the words, that this gentleman came, without any reason whatever, with a heavy massy instrument, to make a loud noise quite close to the head of a very sickly and infirm person.

 These

EVANS v. EVANS.

2d *July* 1790.

These are the ideas which that article, worded as it is, certainly excited in my mind. I do not believe that it could have entered into the conception of the most ingenious person in this Court, to have imagined how this would have ended—to have imagined that it should end in this gentleman's cracking almonds in an adjoining room with a hammer, which, being proper for such a purpose, could be no very ponderous instrument, and his afterwards coming to eat them in his wife's apartment. I do protest it is so singular a conceit, that if I did not see a great deal of unhappy seriousness in other parts of this cause, I might rather suspect that some levity was here intended against the Court. I am sure of this, that if a man wanted to burlesque the Ecclesiastical Courts, he could not do it more effectually, than by representing that such a Court had seriously entertained a complaint against a husband, founded upon the fact of his having munched almonds in the apartment of his wife.

Another offence charged is, that he obstructed the circulation of air. Certainly, that may be cruelty, because health may be affected by it: life may be destroyed by it. Here, again, I look in vain for the testimony of the physician. It is pleaded expressly, *that her complaints were much increased by it.* In the libel it stands thus: *That Mr. Evans, with a wicked view to distress and increase her sufferings, refused to suffer, and would not suffer, the door to be kept open, or even opened at all, except when he went in or out.* Now, any body would suppose that this door was kept obstinately shut during the whole voyage, except when he went in and out; and that this poor lady was

was shut up in an apartment from which the common element was excluded. How does it turn out? Mrs. *Hartle*, herself an invalid, chooses to reside almost constantly in this apartment. Her account is, *that he often shut to the door, sometimes the cuddy-door*, which I take to be the external door, in consequence of which he would suffer the inconvenience in common with themselves; *that at other times he would shut the inner door, between his apartment and theirs; and this*, she says, he did *without apparent cause*, that is, without a cause apparent to her. Now, am I therefore to presume, that because there was no cause apparent to her, that there therefore was no real cause? Am I to call upon a gentleman, at the distance of two or three years, to shew a reason why he shut a door; merely because another person chooses to think, and it is conjecture and inference only, that he did this for the purpose of plaguing his wife? Were there no calls of private convenience? Were there no calls of private decency, but Mrs. *Hartle* was to be previously informed of them? Were there to be no moments of privacy from his own wife, much more were there to be none from the wife of another gentleman? It is said, that in the fact particularly alluded to, he was reading at the time. Why, is a man to be bound down so strictly to time, that he must put on his clean shirt at the very moment of his shutting the door? that he is not to be permitted to take up a book, even for a few minutes? It is said, by way of aggravation of the cruelty, that *he himself did and could walk out upon the deck*. Why could not the ladies do the same? If he did shut the door, they could have opened it with as slight an effort as he shut it. Is

EVANS *v.* EVANS.

2d *July* 1790.

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EVANS v. EVANS.

2d *July* 1790.

it pretended that he locked the door? It has not been contended that he did; but if he had locked it, they had still another retreat, for, as I understand the evidence, their cabin had a door opening to a gallery, communicating with the open air. But supposing some inconvenience was actually produced, yet, in order to make it cruelty, I must affect him with a knowledge that it would have that effect, and in a painful degree; for unless they prove that he was perfectly sensible of that, namely, what the number of necessary inlets for air was, there is nothing like cruelty in the case. How is he to know, more than Dr. *Curry*, who is convicted of a gross mistake respecting this subject? He describes the number of doors and windows, and amongst the rest, the door which led into the apartment of Captain *White* and the officers; and then goes on to say, *that if any one of these doors or windows leading into this (Mrs. Evans's) apartment were shut, the circulation of the air would be obstructed in a very high degree.* Now, the fact proved to me by Mrs. *Hartle*, in this case, is, *that the door which led into the apartment of Captain White was kept shut during the whole of the voyage, except only three days; and that it was so kept shut at the particular request, and for the particular convenience of Mrs. Evans.* What reason have I to say, then, that Mr. *Evans* knew the consequences of opening or shutting one inlet of air, when I find a medical person, perfectly well acquainted with the apartment, lying under so total an ignorance with respect to the very same particular.

The article of foul cloaths was another article which was admitted merely upon the ground of its

its being associated with other articles of more weight: because, where there are articles of great strength in their own nature, the Court is always less delicate about admitting slighter articles, which it would not have admitted singly and standing by themselves. To be sure, it might be a cruelty, if, as described in the libel, he brought large collections of loathsome cloaths, in a very hot climate, into the apartment of a person extremely sick, without any necessity for it, or without any signal convenience. Either this necessity or some signal convenience, would justify it; and it must be shewn that there was neither; for certainly I shall not presume it so, in order to make it out to be cruelty. Now, what is proved in this case? These foul cloaths hung at first in the quarter-gallery. Upon a suspicion entertained by Mr. *Evans*, whether right or wrong is utterly immaterial, that these cloaths were pilfered by Mrs. *Hartle*'s black servant, they were removed into his own room, where they generally remained; sometimes, as Mrs. *Hartle* says, *for near a month.* He therefore had the general inconvenience of them; and it certainly is to me a pretty strong presumption, that he did not conceive these bags to be bags of poison, when he made his own room their ordinary station.—Mrs. *Hartle* says, *that they were from thence occasionally brought into Mrs. Evans's room,* which being a larger room, they undoubtedly could not be more offensive than they had been in his smaller room. She says, *she has seen him bring them in, and his man Oliver assist in sorting them.* In order to be sorted they must be spread, and accordingly they were spread. Now, what hindered the ladies from retiring during this operation? And it has, besides, been justly observed

Evans v. Evans.

2d *July* 1790.

observed by the counsel, that in such situations as these a great deal of accommodation must be practised. Every body who has been in such situations knows, that he must submit to a great deal that is very loathsome; and he must perform a great deal that is very servile. But, however, she says, *they were removed before dinner:* and supposing that the smell did not entirely remove with them, who had the most of it? Undoubtedly this gentleman had not been upon a bed of roses all the time, according to their own account of the matter. But, all this *could not be for convenience*, she says. Why? *Because he used to spread them, under a pretence of sorting them.* Why, has not she herself proved in her deposition that *he actually did sort them*, and *that she had seen both him and his man Oliver employed in that operation.*

Another cruelty is that respecting the denial of breakfast, which is charged in the seventh article of the libel; and it is charged thus:—*That she used to give orders to one of Mr. Evans's servants to boil her tea-kettle, that she might get her breakfast early, as necessary for her health, not only on account of a blister on her side, and a burning thirst that then afflicted her, but also by reason of her being then pregnant; at which times Mr. Evans positively refused to suffer, and would not suffer, his said servant to boil her tea-kettle, and thereby deprived her of the means of satisfying the cravings of nature, and obliged her to resort to drugs for relief.*

Now the proof of this last consequence, of her resorting to drugs for relief, is this, that *one morning Mrs. Hartle saw her take some pills;* but that those pills were specifics against the want of a breakfast, or had any connection with the want of a break-

a breakfast, there is not the least suggestion. In this case, the men-servants to be sure would have been the satisfactory witnesses; because they could have spoken to the orders that were delivered on both sides—to the orders given by Mrs. *Evans*,—and to the orders given by Mr. *Evans*. But all that I can find upon this article is, that Mrs. *Hartle* positively swears, *she knows of no general orders given to the servants not to boil the kettle.* I find also from her, that *Mrs. Evans did send, upon several occasions, about eight o'clock, to her for tea.* I find, on the contrary, from Mr. *Humphry*, *that he generally saw, every morning at eight o'clock, the servant going with the tea-kettle:* and therefore it is no unreasonable presumption, that an omission of any one morning of a punctual attendance at that hour, might be the effect of some accident, or of some particular inconvenience.

It is true indeed, as I find from Mrs. *Hartle*, *that she one morning heard Mrs. Evans desire Mr. Evans, whilst dressing, to let one of his men-servants come to get the breakfast, and he replied he should not come:* but I do not find from Mrs. *Hartle*, that this application was made under a representation of some particular urgency or distress. It amounts to no more than this; that the servants were at that time engaged about his person; that she desired one of them might come immediately, and he refused. This might be uncivil, or it might not: that depends upon the manner of the refusal, upon the delay interposed, and upon the occasion that was at this time occupying the attention of the servants. But I shall not hold this to be decided cruelty, till I am first satisfied of this position—that if a husband is employing his servants about

Evans v. Evans.

2d *July* 1790.

about his own person, he is, upon the very first summons, to detach them on the commands of his wife; and that if he declines this, the very instant that it is required, it is not only an incivility, but that gross inhumanity for which the law will grant relief.

There is one charge of a graver complexion, and that stands in the tenth article:—*That one evening, whilst the ship was in her passage, and whilst Mrs. Evans continued in a very weak and sickly state of body, pregnant, and scarce able to move, and being desirous to go to bed, she called to Mr. Evans, who was in an adjoining cabin with two of his men-servants, desiring he would send one of them to unlash her cot, that she might go to bed; but that he positively forbad his said men from following her directions, and she thereupon called a little black girl to assist her; upon which Mr. Evans ran into Mrs. Evans's cabin, and in great rage and anger pushed the said little girl away, and, with great fury and force, gave Mrs. Evans so violent a blow or push as drove her to the further or other end of the said cabin, and laid her prostrate on the floor, where she remained a considerable time without being able to rise, and thereby greatly hurt and bruised her, and put her in great peril of her life; and that Mr. Evans, without regarding the helpless situation to which he had reduced her, with the greatest indifference retired to his own cot in the next cabin, and from thence uttered the most shocking and abusive oaths and imprecations against his said wife.*

There are three witnesses who are vouched in this very article, who certainly could have proved a very considerable part of it; they are, the two men-

men-servants, and the black girl. It stands however a naked charge, without evidence, or even an attempt at evidence;—a charge in itself almost of direct murder, and subject to all the observations which I have made, upon the impossibility of such a fact as this escaping notice; and yet not a single witness is produced to it! Surely it is not a sufficient apology in such a case to say, that it is a misfortune that it could not be proved; because it is a misfortune which must have been perfectly known, I apprehend, to the party, at the time when she inserted this article. And I must say, that to blacken the records of the Court with an accusation of so very grave a nature, without calling one witness to support it, is taking something of a liberty with the Court, and is taking a pretty gross one indeed with the person who is the subject of such an accusation.

Upon the whole history of the voyage, and the facts contained in it, I find myself compelled to say, that I have no evidence which satisfies me, that Mr. *Evans* has acted in this voyage in a manner inconsistent with the duties, and the rights, of a husband. If he had so done, it is impossible but that there must have been ample evidence; on the contrary, a great part of the evidence is absolutely irreconcileable with the notion of such misconduct having been practised. The evidence that does support it comes from the mouth of a person, who is in a great degree disabled by her prejudices.—But let me not be understood to insinuate, that this witness comes forward to deliver a false testimony. I am firmly persuaded that she believes every word she says; but she trusts to her resentments rather than to her recollections; she brings

EVANS v. EVANS.

2d July 1790.

brings with her sincere intentions, but she does not bring a dispassionate mind; she does not bring that caution, and that sobriety of mind, which belong to a witness, deposing in a Court of Justice, upon matters by which the character of another individual may be so deeply affected.

The voyage ended in the middle of *September*, she being then, I think, as was observed by Dr. *Laurence*, not above three months pregnant; and about six weeks of this time had been spent upon the voyage from the *Western Isles* to the chops of the *Channel*; so that the pregnancy is clearly proved, I think, to have been in such a state of mere incipiency, during some of the facts spoken to, that it cannot be understood to make any material ingredient in the cruelty.

Upon their arrival they were received, as far as appears, with affection, and with politeness, by their friends on both sides. Nothing transpires of all these horrible businesses, which had happened on board this ship. Mr. *Evans* is proved by Mr. *Thackeray* to have then possessed his good opinion, and that of other persons of his family.

What is Mr. *Evans*'s behaviour upon his arrival? In three or four days he invites Mrs. *Hartle*, a person not very acceptable to himself, but the friend of his wife; he likewise desires Mr. *Paumier* to give her all necessary attention, to give her every possible attention during her illness. He soon after goes over to *France* with her, where he engages in his service a Mademoiselle *Bobillier*, a young *French* woman, at the express request of his wife: they return, and they settle in *Bond Street*. Mr. *Thackeray*, to whom I very much adhere during the whole of this business, says,

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That Mr. Evans's general conduct and behaviour to Mrs. Evans was very attentive; and that he saw nothing improper therein, till near the time of her lying-in: he admits too that Mr. *Evans* supplied her liberally with money till almost the time of the unhappy separation. EVANS v. EVANS. 2d July 1790.

The evidence of this *Bobillier* is, *that she herself never was a witness to any quarrel between them;* but, *that,* she says, *was mere craft on his part;* for she infers, from tears which she has found Mrs. *Evans* in, and the Counsel have laid much stress upon these tears, that there must have been secret ill-treatment. I own, that tears, in the case of a very nervous person, do not seem to me to lay the foundation of any very conclusive evidence one way or the other.

In *January*, going to a ball at Mr. *Hastings*'s, she had, somewhere or other, I think it is not clearly proved where, the accident of a fall. It is spoken to by a great number of witnesses on both sides. This fall was not the occasion of much immediate injury, as far as appears: this appears however from many of the witnesses, that, upon that occasion, Mr. *Evans* acted with a very laudable tenderness. He carried her up stairs in his arms. He applied to Mr. *Paumier* to recommend a doctor, having his apprehensions of the consequences which it might occasion: Doctor *Denman* was the person who came. And it appears that she actually did miscarry within three or four days after this fall. To be sure, the argument of "*post hoc, ergo* "*propter hoc,*" that because the miscarriage immediately followed, therefore it was occasioned by that which it followed, is not a very conclusive one; for it is no very easy matter to trace a misfortune

EVANS v. EVANS.

2d July 1790.

fortune of this sort to a precise cause, and with such exactness as to say that, either in the whole or in part, it was owing to the fall, and to nothing else.—But, however, this at least is clear, that to her nurse, Mrs. *Tate*, a confidential person most certainly, Mrs. *Evans* did herself ascribe her miscarriage to that accident. It certainly is not improbable, though no immediate injury had happened; because, as it is generally understood, fright, alarm, and agitation of spirits, frequently do precipitate such matters; and what makes it more probable in this instance is, that it is in proof that this lady was in the habit of miscarrying, for it is proved she had had two miscarriages before her return to *Europe*.

Yet, in her libel, Mrs. *Evans* herself has ascribed the miscarriage to a very different cause; for it is pleaded, that *it was occasioned wholly by the pain, anxiety, and terror that she was continually in, from the cruel treatment of Mr. Evans.* I have above stated what Mr. *Evans*'s *visible* conduct was, from Mrs. *Evans*'s own witnesses; from her own family; from persons of honour and of caution, and who certainly would not have dissembled it, had it been otherwise.—What was not visible must be merely conjectural, and, in my apprehension, very perversely so, if it is to be represented as opposite to that which was visible. To what this miscarriage was imputable I do not pretend to say; but I do say, that it was not owing to the cruel conduct of Mr. *Evans*; because, if it had, it is most perfectly clear, that such conduct must have been proved. Now, to whom is it known, that Mr. *Evans* was the author of that miscarriage? Why, to one witness only. To Mademoiselle *Bobillier*, a young woman

woman of the age of twenty-five, who does take upon herself positively to swear,—that *this premature delivery*—I use her own words—*was entirely occasioned by the unkind behaviour of Mr. Evans to his wife, and for want of proper attention to her during her pregnancy.*

As this witness makes a pretty conspicuous figure in this cause, it is necessary to consider a little who she is. Her deposition, upon the face of it, is highly coloured and inflamed, very descriptive, full of image and epithet, something in the style really of a *French* novel, of the trash of a circulating library. At the time of her giving in her deposition, it is also in proof that she had had a pretty acrimonious suit with Mr. *Evans.* She is a young woman, who having been first known to Mrs. *Evans* upon her former excursion into *France*, was, on this second excursion, taken into the family as a governess, and was brought to *England* in *November;* she therefore was in the service only two months of the pregnancy, and she most positively declares, his visible behaviour to Mrs. *Evans* was perfectly proper during the whole of the time.

She appears to have been on terms of great intimacy and confidence with Mrs. *Evans.* I need not observe upon the abuse that is too frequently made of that sort of situation.—Female friendships are often hazardous, in the case of married women, but, of all friendships, humble friendships are the most dangerous. The humble friend has an obvious interest in falling in with the present humour,—in creating and in inflaming differences between the husband and the wife,—in acquiring importance to herself by being a sort of third

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EVANS *v.* EVANS.

2d *July* 1790.

estate in the family. I own I cannot but think that it has been a very great misfortune to this family, that this person ever became a member of it; for in this I am clear, that if she aggravated matters, in her reports to Mrs. *Evans*, only half of what she has done in her reports to me, she has employed an activity that has been most fatally successful in troubling the repose of this family.

To be sure it is a monstrous proof of an intention to exaggerate, beyond all decency of appearance, that this witness, who had been little more than two months in the family, takes upon herself positively to say, *that this miscarriage was owing to her being kept, during the whole period of her pregnancy, in a state of persecution.* Taking this assertion in the most qualified way, it is a very unwarrantable assertion, undoubtedly, for the witness to throw out. What possible confidence can I then have, that any thing she says is true, when I find her swearing at random to what it is impossible she could know, whether it be true or not? The fact is, she is not supported by any one witness in the case: there is not another witness examined, on the part of Mrs. *Evans*, who refers the miscarriage to the same cause. Mrs. *Thackeray* makes no reference of it to that cause; Mrs. *Evans* herself makes no reference of it to that cause; she refers it, in her conversation with Mrs. *Tate*, to another cause entirely: to Dr. *Denman*, and to Mr. *Paumier*, she does not pretend to insinuate that it is the effect of any such ill-treatment. And as to his want of attention to her, which is stated by this witness, it is most positively contradicted by the person who must know it best; that

that is, by the very apothecary who attended her, and who speaks, in the strongest and most unreserved terms, to the care and attention shewn to her by Mr. *Evans*.

The libel pleads, in the eleventh article, to this effect:—*That after the arrival of Mr. Evans and his wife in England, and whilst they resided in Bond Street, she was delivered of a seven months' child; which premature birth was wholly occasioned by the pain, anxiety, and terror she was continually in, from the cruel treatment of Mr. Evans; and that whilst she was in labour, he barbarously refused to call any assistance to her; and when, at last, assistance was had, he obliged her attendants to leave her, when he bolted the door upon her, and detained her from them for more than an hour, notwithstanding the pains of labour were then severely upon her, and her life was in imminent danger, for want of assistance: and that after her delivery, she was for six weeks, or thereabouts, confined to her room, in a very low, weak, and languishing condition, and her life was despaired of; notwithstanding which, Mr. Evans greatly disturbed, harassed, and tormented her, by frequently making great noises, and by knocking aud thumping in her bed-chamber, and thereby preventing her from taking any rest; and also by suffering and allowing his men-servants to make great uproars and disturbances, when intoxicated, over her head; all which endangered her life.*

Now here we are all agreed;—the counsel on both sides concur in the atrocity of this conduct;—because, if it be true, that he treated his wife in this brutal manner, in an hour when every animal and every moral feeling called for his tenderness, he is one of the most disgraceful excep-

EVANS *v.* EVANS.

2d *July* 1790.

tions to human nature that one has ever heard of; a more enormous conduct cannot be figured by the imagination; thus to attempt the life of his wife, and the life of his own infant, is a cruelty that out-herods *Herod.* It is impossible that the friends of any woman should suffer him to live one minute afterwards with her, if they were not destitute of common sense, as well as common humanity.

Bobillier is the principal witness upon this article. I had almost said the only witness; and I am satisfied that the account which she gives is utterly discredited, even by herself, as well as by the other witnesses who are vouched for this article.

The account that she gives is this:—That "*in* "*the month of January* 1788, *she was delivered of* "*a seven months child; which premature birth was* "*entirely occasioned by the unkind behaviour of* "*Mr. Evans towards his wife, and for want of* "*proper attention being paid to her by him during* "*her pregnancy; she having been constantly kept,* "*during the whole period of her pregnancy, in a* "*state of agitation of mind, by the teazing contra-* "*dictory behaviour of her said husband, who never* "*suffered her to have a minute's peace, and who* "*always took occasion to quarrel with her from the* "*most trifling occurrences. That, about two o'clock* "*in the morning of the day on which Mrs. Evans* "*was so brought to bed, Mr. Evans came into the* "*deponent's bed-chamber, and, having awoke her,* "*he told her that Mrs. Evans wished to speak with* "*her.*" This is the proof that this gentleman barbarously refused to call assistance, when he was the very first person that got up and went into the apartment of this confidante, and for this express purpose. "*She went into her apartment,*" she says,

"*and*

EVANS v. EVANS. 2d *July* 1790.

" *and then gave her such linen as was necessary for* " *her situation.*" What she means by that expression is not very clearly to be understood, because it is most clear from what follows, that she had not any idea that at that time Mrs. *Evans* was going to miscarry; for she goes on to say, that " *neither the deponent, nor Mrs. Evans, as she* " *verily believes, had then any idea, that she was* " *going to miscarry; the pains she suffered, and* " *the symptoms attending them, being entirely dif-* " *ferent to what the deponent understood had been* " *the case on her first lying-in: that Mrs. Evans* " *then informed the deponent of her having made* " *Mr. Evans acquainted with what she felt, and the* " *deponent verily believes that he well knew that his* " *said wife was then in the pains of labour and going* " *to miscarry.*"—That is to say, these two women, this woman of the age of twenty-five; the other lady, who had had children, and who had twice miscarried before, have no suspicion of what is going to happen; but, for the purpose of making out an act of cruelty, he is to be affected with the knowledge of this circumstance, with the knowledge of a fact, of which these two women, as she declares, were themselves utterly in ignorance.

She goes on to say, that " *he desired the depo-* " *nent to return to her apartment, and said that he* " *would give her notice if she became worse; that* " *Mrs. Evans then told the deponent, that she wished* " *her to stay by her; but Mr. Evans having ex-* " *pressed his intention to abide by her himself, Mrs.* " *Evans did not dare to insist on the deponent's con-* " *tinuance with her, for fear of the resentment of* " *Mr. Evans.*"

 That

Evans v. Evans.

2d *July* 1790.

That her continuance was pressed is not at all stated. Mrs. *Evans* desired she might stay; her husband said he would stay, in order to give notice if the intervention of any other person was necessary. This desire, from what appears, was immediately given up, and this woman accordingly returned to her own bedchamber. *About seven o'clock on the following morning*, she says, *she went into the bedchamber of Mrs. Thackeray, the sister of Mrs. Evans, who was then on a visit to her, whom she acquainted with what had happened in the course of the night.* I think she would have acted at least with as much prudence, if she had done this at the very moment when she had been summoned by Mr. *Evans*. She however acquainted her then with what had passed, and Mrs. *Thackeray* instantly said, *she was sure her sister was going to miscarry, and she immediately got up. Mrs. Thackeray then sent for Mrs. Webb, the mother of Mrs. Evans, and Dr. Denman; they both came about half after ten o'clock in the morning, at which time,* Bobillier goes on to say, *Mr. Evans was still in the bedchamber with Mrs. Evans, and had not himself given any directions whatever in regard to her, although fully aware of her dangerous situation;* in short, that he remained so many hours perfectly cognizant of the situation of his wife, without giving any directions with regard to her.—Now let us enquire what *Tomlins* says on this part of the cause. But I must first take notice, that *Tomlins* is the waiting-maid of Mrs. *Evans*, and a witness who is examined on her side; yet she is a witness whom they have not thought fit at all to examine, to this matter of the lying-in. All that she deposes on the subject comes out upon the interro-

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gatories put by Mr. *Evans*. In the next place I must take notice, that there is another person, and that is the nurse, who must have also been cognizant, and in a very informed degree, of every thing that passed; and it is a circumstance that cannot escape the observation of the Court, that this nurse is not at all produced on this side. Why, it is impossible but that these two persons must have known every thing that happened upon this occasion.

EVANS *v.* EVANS.

2d *July* 1790.

Tomlins, however, is examined upon interrogatories as to this fact, and what she says is this; *that in the morning, the house-maid told her, that Mrs. Evans had been ill ever since three or four o'clock in the morning; that she the respondent, going up between eight and nine the same morning, found Mrs. Evans in bed, crying; when she told the respondent she was ill, but knew not what was the matter with herself; but the respondent, from the account she gave her, thought she was in labour; and the respondent almost immediately went down and told the circumstance to Mr. Evans; who desired her to send for the Doctor as quick as possible.*

Then it is proved by this witness, that at this time Mr. *Evans* was down stairs, though *Bobillier* positively swears that he was shut up in the room with her till between nine and ten o'clock. He was then down stairs, and, upon the first intimation of an opinion given to him that she was going to miscarry, he did immediately order a doctor to be sent for as quick as possible. That he had not himself given any directions with regard to her, where is the wonder? why, were there not women in the house, upon whom that office naturally devolved? Mrs. *Thackeray*, her own sister, was in

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EVANS v. EVANS.

2d July 1790.

the house. Why, is it to be understood that on such occasions it is a duty which adheres so close to the character of husband, that it cannot by any possibility be discharged by deputy? Is it to be insisted that it was his duty, and his duty alone, to give such directions himself; and that it is a crime in him that he relies upon the discretion of the persons about her? This is such an imputation that would affect the character of almost every married man, if it was permitted to weigh for one single moment. However, *he then came out of his bedchamber*, as *Bobillier* says, *but not before the arrival of Doctor Denman.* She says, Mrs. *Evans* told her a great deal of conversation, and *taking hold of her by the hand, begged her not to leave her any more.* This is one, amongst many, of the proofs of that sort of unhappy intimacy, I think, which subsisted between these two persons. She goes on to say, that *Doctor Denman being afterwards introduced, immediately told Mr. Evans, Mrs. Webb, and Mrs. Thackeray, that she was going to miscarry; and the said ladies last-mentioned thereupon sent for a nurse to attend Mrs. Evans, but Mr. Evans gave himself no concern about it.* Why, what concern was he to give himself about it? The doctor was called, and the nurse was called. What then remained for the husband to do? I should have been glad to have had it stated, by either of these ladies, what the proper or possible conduct of a husband in such a situation should have been.

Bobillier then goes on to say, *that he afterwards burst into the room in a very abrupt manner, so as greatly to alarm and terrify Mrs. Evans, who was then in the pains of labour, and said, that they had got*

got his tea-pot; which was immediately sent out to him. Mrs. *Thackeray* mentions the same circumstance of the tea-pot; but not one word of this abrupt manner, which had the effect of frightening this poor lady, in this situation: all that she says is, that *he put his head into the room, made enquiry after his tea-pot, but made no enquiry after Mrs. Evans.* This then is the whole of the cruelty; that when he came, having some particular fancy for this tea-pot, which, perhaps, was not in particular use at that time, he desired to have it out, and retired without at that moment making a particular enquiry after his wife.

Another fact of cruelty is, that he refused the nurse the *elbow chair.*—That every body knows, is one of the high prerogatives of these ladies, upon such an occasion; and one would have expected, that the nurse herself would have come forward, with no little acrimony, on such an account: but on the contrary, she is examined, and I don't find that this circumstance of the elbow chair has made that impression upon her mind, which it seems to have done upon that of Mademoiselle *Bobillier.*

I come now to that which is the most atrocious fact in the cause, and a most atrocious one it is—that after it was fully ascertained, that this lady was going to miscarry, this gentleman turned out the attendants, and kept this unhappy lady by force, with the pains of labour then upon her, to the manifest danger of her own life, and to that of his own infant, and kept her shut up, absolutely excluding all sort of assistance.

This is what is positively sworn to by this Mademoiselle *Bobillier.* I own upon the face of it, it is a thing grossly improbable; knowing, as every

Evans v. Evans.

2d July 1790.

every man does, the natural and the laudable warmth of women respecting a business of this nature—the delivery of another woman. I think, therefore, it is impossible but that, if a barbarity of this nature had passed, nothing could have stopped the women who were in the house from making their immediate way to the assistance of this lady; and I am very sure, that nothing would have stopped them from making their way to this Court, to give a representation of what had happened. There is not a single witness who comes forward to say one word about it; and yet the nurse has been examined, who is stated to have been in the outer apartment, and to whom it is positively said to have given great uneasiness; *Bobillier's* words being, *to the great surprise and disappointment of her mother, of this deponent (Bobillier), and of the nurse, who was uneasy thereat, for fear of the bad consequences which might attend the delay.*

What the nurse says is this, that she has every reason to believe, that Mrs. *Evans* was, during her lying-in, attended by proper persons, and had proper assistance, comfort, and support; that she has seen Mr. *Evans* several times carry his wife in his arms, and treat her with great tenderness and affection; that *she knows not that the premature birth was occasioned by the ill-treatment of Mrs. Evans by Mr. Evans, and never heard the same while she continued to attend her, and never witnessed any ill-treatment of him towards her. That Mr. Evans did not in her presence, or to her knowledge, when she was in labour, refuse to call any assistance, or oblige her attendants to leave her, or detain them from her, nor was her life in danger for want of proper or any assistance.* This then

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is the account given by this nurse, who is vouched as a person upon whose mind this transaction made this deep impression.

Bobillier goes on to say, that *she verily believes that the life of Mrs. Evans was in danger by the cruel behaviour of Mr. Evans towards her, as well during the night preceding the delivery, as during the time she was locked up in the room.*

I have, in opposition to that, the evidence of *Frances Tilbury*, who was the house-maid; of *Mary Tate*, who was the nurse; of *Mary Mayall*, the wet-nurse; of Dr. *Denman*, and of Mr. *Paumier*; and I ask if it is possible that all or any of this could have happened, and that not one of these persons should speak at all to the matter? Is it possible that they should have given a representation of it so totally inconsistent? But look at the conduct of the parties in this case. What is proved? Undoubtedly the mother, who had come at this time; undoubtedly Mrs. *Thackeray*, who was in the house at the beginning, must have fired with indignation upon such an occasion. But there is nothing of this sort intimated in the evidence of Mrs. *Thackeray*. The account she gives is simply this: — That *she was at Mr. Evans's in January*, 1788, *and then saw her sister, Mrs. Evans, and staid there with her four days; that Mrs. Evans then spoke of her expecting to be delivered in two months from the said time; but that on the last morning of her being there, the deponent understood Mrs. Evans was very ill, and was in bed with Mr. Evans; and, being about seven o'clock in the morning, the deponent was alarmed by the account, and desired of the servant who told her of the circumstance, that the doctor should be sent for.* Very properly, without doubt; Mrs. *Thackeray* was the proper person

to

EVANS v. EVANS.

2d *July* 1790.

to have delivered these orders; and as to the formality of sending to the husband, that the orders might be delivered through him, that was a formality that might certainly be very well dispensed with. *About nine o'clock in the same morning*, Mrs. *Thackeray* says, *she made enquiry whether the doctor had been sent for? when she understood, to her surprise, he had not; on which she sent a message to Mr. Evans, desiring he would not delay a moment sending for the doctor, as he knew her to be in a very dangerous critical way.* This is about nine o'clock; though *Bobillier* has sworn, that between nine and ten she found him shut up with her in the room, and that nothing had been done. Now, there is no proof in this case at all, that this message was delivered to Mr. *Evans.* However, Mrs. *Thackeray* goes on to say, that, *understanding Mr. Evans had arose, she went into his room, and found Mrs. Evans in bed therein; that she was very feverish, greatly agitated, and in pain, and she thought her in labour; that, about eleven o'clock the same day, she, the deponent, was making tea for Mrs. Evans in her room, when Mr. Evans came to the door, and, putting his head into the room, told the deponent, that she had got his tea-pot, but made no enquiry about Mrs. Evans; that shortly afterwards Dr. Denman came, and confirmed the certainty of her being in labour.*

All then that I see proved in this case, by Mrs. *Thackeray*, is this; that she in the morning gave very proper orders, that the man-midwife should be sent for; that the man-midwife was not sent for, as he ought to have been, owing to the neglect of the person who received those orders, but not, as it appears, owing to the neglect of Mr.

Evans:

EVANS v. EVANS.

2d July 1790.

Evans: that between nine and ten, understanding he had not been sent for, she then sent a message, desiring that he might be sent for; and there is evidence over and over again in this case, to shew that Mr. *Evans* not only did send, in the manner which has been mentioned, but that he did, what most husbands, I presume, don't think themselves under any moral obligation to do; and that is, that he actually took his hat, and went out upon the business himself. But what weighs most with me in this case, and which is constantly uppermost in my mind, and repels every intimation of this sort, is the consideration of what was the behaviour of the persons who must best have known, and most deeply have felt, the misconduct of Mr. *Evans*, if any such had existed.

Well, the delivery is effected, and is happily effected; the child is born.—Now, is it possible, that, after a behaviour so atrocious as Mr. *Evans's* is represented; is it possible that no resentment should have been expressed on the part of Mrs. *Webb*, the mother, and the other relations of the family? This is absolutely incredible. It is proved by *Tilbury*, that, *presently after, Mr. Evans hearing the door of Mrs. Evans's room open, he went to it, and Mrs. Webb came to the door, and plainly told him, in her hearing, "Thank God, it is all well over with Mrs. Evans, at last!" on which Mr. Evans asked her what Mrs. Evans had got? to which she replied, a girl; and Mr. Evans, about an hour afterwards, went into the room.* I here ask, if it is conceivable, for one moment, that a business of this sort should have passed off just as smoothly as if nothing had happened to have discomposed the temper of any one person who was concerned in it?

EVANS *v.* EVANS.

2d *July* 1790.

it? That is absolutely impossible. Taking then the whole of this business, without entering into the more minute circumstances, the principal conclusion which I arrive at is this, that there is no one fact in this case which I shall take upon the credit of that witness *Bobillier*. Of the other witnesses I go the length of saying, that they have deposed with passion; but of her I have no hesitation to say, that she has deposed absolutely without principle.

The next charge is that of making the noises, and which is deposed to singly by *Bobillier*: there is not another witness who has spoken to it. *Tate*, the nurse, who must have heard these noises, and who must be a nurse, in the constitution of her mind, very different from all other nurses that one has ever heard of, if she was willing to dissemble this ill behaviour of the noises, she is not examined at all by them. *Tomlins*, the waiting-maid, who must have been frequently in the room, is not examined upon the subject. *Mayall*, the wet-nurse, is not examined upon the subject. On the contrary, here are a cloud of witnesses who depose the reverse. There would be no end of going through them all; there is *Mayall*, there is *Frazer*, *Tate*, *Tilbury*, who all depose, *uno ore*, that they know nothing of these noises, excepting, that when there were noises, Mr. *Evans* interposed, and expressed a great deal of resentment; that he cautioned his servants against making these noises; in short, that he did as much as any master of a family can do to prevent the interruption of his wife's quiet.

As to his general attention to her during her illness—they have pleaded a total want of it; which,

which, to be sure, would have been a very natural consequence of that which they have pleaded—his barbarous refusal to call assistance. But his attention to her is established beyond a doubt.—*Tate* speaks to it; *Mayall* speaks to it; *Tilbury* speaks to it; Dr. *Denman* speaks to it; Mr. *Paumier* speaks to it more fully. I do believe, that there is hardly a case, in which a husband could collect upon the subject so many favourable testimonies, as it has been the good fortune of this gentleman to bring together of that fact. *

After

* On the depositions of some of the witnesses referred to in this part of the case and on others; an allegation, exceptive to their credit, was given on behalf of Mrs. *Evans*; and *opposed*, on the grounds noticed in the observations of the Court. Which, as they discuss the general principles of evidence and of practice on these points, are introduced here.

Court:—This is an allegation exceptive to the credit of witnesses,—and it is objected, amongst other things, that there has been improper delay in introducing it. Some delay has appeared in the progress of the cause, but I see no reason for saying that the allegation is liable to a fatal objection on that account alone, if it is in its contents admissible. This cause was originally instituted by Mrs. *Evans* for a separation by reason of cruelty. In her libel she pleads, as is usual (*a*), though not necessary, and sometimes disadvantageous, *her virtuous education, and good disposition, and her excellent conduct in the characters of a wife and a mother*. One inconvenience arises from an article of this kind, that it gives opportunity and invitation to the other party to counterplead, in contradiction to this good character, as has been done in this case, in which a counterplea is given full of unfavourable epithets applied to her, and, amongst others, that she is a woman subject to habits of *intoxication*. 6th *May* 1790.

Now certainly it may go to the very point in issue, whether she is so subject or not; because many acts in a husband, which would constitute legal cruelty towards a sober woman, may be acts of

(*a*) The practice has since been discontinued.

necessity

Evans v. Evans.

2d *July* 1790.

After this discussion, it would be idle for me not to say, that I do consider the whole imputation as an absurd calumny. I have no other way of accounting for the conduct of the relations. If the fact had been as is pleaded, it is impossible but that they must have known it; and if they had known it, they must have been destitute of all common sense, and of all common humanity, if they themselves had not been forward in loudly demanding a separation the very day after it had happened.

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necessity towards one, who is subject to such an odious infirmity. It might be no cruelty to deprive such a person of the management of her family, or to restrain, upon some occasions, her personal liberty. In this particular case likewise, in which Mrs. *Evans* is pleaded "*to be a woman of great morbid delicacy*,"—if she was proved to be guilty of habitual intoxication, it would account for many appearances that might be referable to that cause.

It has been made a question, incident to the general argument on these objections, what is the duty of the Examiner? Whether he should have admitted particular specifications or not in taking the depositions. And it may be a matter of great difficulty to prescribe what an Examiner is to do in all cases. To lay down an universal rule is impossible; but, in general, he should strongly disincline to receive specific facts, where the article, admitted by this Court, is in general form.

It must be understood to be the intention of the Court, where the articles in the plea are general, that the examinations taken upon it, should be likewise merely general. I will not say, that cases may not arise where a specification, under such an article, may be received, particularly in cases merely civil; but where it is introduced, such specification should be exact as to time, and place, and all other material circumstances: for, without such exactness, it remains little better than the general plea. The present case is brought for civil relief, but founded on a *criminal imputation*;—the charge is, that he has treated his wife with want of due tenderness;—and the vindication is, that she is a person of such habits as to make the want of tenderness in some degree justifiable.

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EVANS v. EVANS.

2d *July* 1790.

From that time there is a chasm in the history of actual cruelty till the fourth of *October* 1788; of actual cruelty, I mean, so far as it is concerned in bodily acts. They travel, by the advice of Dr. *Denman*. *Bobillier* says, that *Mr. Evans made disagreeable difficulties*. What those difficulties were, I don't know; they might be real difficulties. Mr. *Evans* had not been able to settle his affairs in *India*, and it might have been very inconvenient to him to leave town; and the difficulties being real,

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It thus becomes of a criminal kind as to her also. And in examining on the general charge of habits of intoxication, the Examiner ought not to admit specification, but adhere to the form of the plea. And it is a general rule, that wherever specification is introduced, it shall be so exact, as to give the party full opportunity of defence.

Another rule by which the conduct of Examiners, particularly in these cases of character, should be guided, is, that the facts allowed to be stated must be plain and *simple*, and not such as will probably run into intricacy of discussion or ambiguity. In *Wilson* v. *Wetherell* (*a*), which has been quoted by counsel, an *attack* was made, in an allegation, upon the *general* character of an individual. Several witnesses were examined upon it, and the Examiner let them run on into specifications. Some said, they thought him a bad man, because he had defrauded them, as members of a public company. Now, fraud itself is composed frequently of such ingredients, that, to establish it, might occupy an inquiry of some years in a court of equity. How, then, could this Court entertain, incidentally, and only as an excrescence from the original cause, a matter which might easily have overgrown the cause from whence it sprung?

These are general rules fit to to be observed; and there is one more,—that if an Examiner entertains a doubt, it is safer for him to decide in the affirmative, and to receive what the witness can say, than to reject it totally; because the Court can do that at last, if it thinks proper; and there is no irreparable injury done by admission, as there may be by too hasty exclusion. Subject

(*a*) Prerog. 27th *May* 1789.

 to

EVANS v. EVANS.

2d *July* 1790.

real, might not be the less disagreeable for being real. But however they do travel; and there is a space of nine months, I think, in which his cruelty appears to have been in a pretty deep sleep. However, it was only the sleep of the lion; for, upon the fourth of *October*, an act of barbarity was practised, which, to be sure, is equal to any of its predecessors.

It is stated in this way in the libel:—That, *after Mrs. Evans recovered from her lying-in, Mr. Evans would*

to these observations, I shall proceed to consider this allegation. The first article is general, and excepting to the credit of certain witnesses, as persons of *infamous character*, and not to be believed on their oaths. It has been disputed, whether such an article can be admitted substantively, or only as introductory, when offered *after publication*; and, most certainly, the practice has been a little fluctuating upon that subject. By the ancient text law, to which it is most safe, in such variation, to adhere, it cannot be admitted *substantively*. That principle is to be found in the Decretals (*a*). Whether the more ancient practice of our own Ecclesiastical Courts may have deviated from this rule, I do not find; but it was considered as an existing rule in the case of *Cunnington* v. *Coxe* (*b*), of which I have an exact note, "that as to the "mere general character of a witness, the exception ought to be "taken before publication." This rule was, for the first time within my memory, impugned in *Arabin* v. *Arabin* (*c*), where there was an objection taken *on that ground*. The rule was sustained in the Consistory, and in the Arches; both those Courts being of opinion, that a general article merely ought not to be admitted after publication. The cause went to the Delegates, upon appeal on that point from the Court of Arches; where the party appellate being anxious, on private considerations, to have the cause heard on the principal merits, and not thinking that incidental point sufficiently material to retard the proceedings, consented *to the repeal* of the two former sentences, which passed, on motion, by consent, and wholly *sub silentio*. But when that cause came on

(*a*) Decret. Greg. lib. 2. tit. 19. c. 9.

(*b*) Prerog. 28th *June* 1781.

(*c*) Consist. 15th *July* 1786. Arches 15th *February* 1787.

would seldom let her lie at her ease in her bed, he frequently thrusting his elbows and knees into all parts of her back, sides, and loins, and thereby greatly hurting her; that in the night of the fourth day of October 1788, Mr. Evans and Mrs. Evans being in bed together in their house in Conduit Street, he, without any cause or provocation whatever, began to quarrel with and abuse his said wife, and with great force and violence seized her, and dragged her to every part of the bed; beat her head against each

EVANS v. EVANS.

2d *July* 1790.

on for sentence on the merits, it was strongly signified to be the opinion of one of the Judges, that the old practice of excluding such matter was correct and proper.

In *Bailey* v. *Bradburn* (*a*), the same doctrine was held here very recently; and I understand the same to have been since recognized in *Raybold* v. *Raybold* (*b*) in the Court of Arches. I hold it, then, to be the known and existing law, and to which, till I am otherwise instructed by superior authority, I shall adhere, — that an article of this kind can be admitted only as an introductory article after publication. It must be observed, then, that it being merely introductory, the Examiner is not to examine upon it.

The first person excepted against is Mr. *Finch Mason*, an officer in his Majesty's service. And it has been said, that an attack of this nature is injurious to his character. But every witness, produced in a court of justice, is liable to such an attack; and it does not rest with the Court, but the party, if the attack is injuriously made. On this account, however, as well as on more general considerations, exceptive allegations are to be carefully watched. Parties state their case, and examine their witnesses, and it becomes occasionally an object with one party, having sinister designs, to lie by till after he has seen the depositions, and then to endeavour to get rid of such witnesses, as are most likely to operate to his disadvantage. Courts of justice, therefore, are tender in suffering evidence to be attacked in this manner, without strong reasons given for it. And where there is ground for it, the rule is universally laid down, that the exception taken must not be of an ambiguous nature; and the party excepted to, if on the ground of general

(*a*) Consist. 27th *November* 1788.

(*b*) 8th *December* 1789.

Evans v. Evans.

2d July 1790.

each of the bed-posts, and twisted, distorted, and forced her limbs to so violent a degree, that he brought her feet close up to her mouth; in which condition she swooned away; and in that helpless state, after giving her several dreadful blows and kicks, which caused the blood to issue from her mouth and other parts of her body, he turned her out of bed naked on the floor; in which condition, helpless, and apparently lifeless, she lay a considerable time, until her piercing cries brought three women from different parts

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general bad character, must be attacked in such terms as plainly assert *that imputation*. This is the rule for exceptions "*contra personas*." If the exception be "*contra dicta*," that is, arising out of the depositions of the witness, it must be observed, that, by allowing such an exception, it is not meant that you are at liberty to controvert every declaration of witnesses, but that you may except to their credit and character, from what arises out of their depositions; and, to do this, it must be shewn, that a witness has misrepresented the matter *corruptly* and *wilfully*. There must be what the law calls "*falsitas cum corruptione*." Every man is liable to error; and, on the supposition, that a witness states his opinion from appearances, it is not merely from misapprehension, or from proof of his being deceived, that he is to be contradicted, in the way of exception to his credit; and that he is to be sent forth into the world as a person of disgraced character: This must be only from wilful and corrupt falsification.

How will this apply to Mr. *Mason?* The principal facts of his depositions are such, as, if contradicted, would not do more than affect him with inaccuracy or misapprehension. In one place he goes on to say, "that he once saw Mrs. *Evans* in a state of disorder from "liquor," which, unless it means when he first arrived, and this is not averred, is objectionable for want of specification of time. The fact ought not to have been taken down without such plain specification, and being so defective, the Court would not regard it as evidence. If the facts alleged in contradiction to him, therefore, were all to be proved, it would not *invalidate* his testimony as to his belief. I will not say however that it might not perhaps warrant an application to the Court to open the cause for a defensive purpose. On

EVANS v. EVANS.

2d July 1790.

parts of the house to her assistance, who found her naked on the floor, with her mouth full of blood, to all appearance dead; her limbs quite cold and stiff, and her legs crossed, and so twisted, that it was with great difficulty they could extricate them, and which they could not begin, until she shewed some appearance of returning life, and could not effect until they had been with her upwards of an hour; and that, by the aforesaid cruel treatment, Mrs. Evans was put to great pain and anguish, and her life was in imminent

On this point, I think the general and correct rule is, that wherever the matter is originally laid down in the libel or allegation with due specification, you shall not be at liberty to introduce a contradictory plea, on account of any thing which arises on the depositions of the witnesses. But if there is such want of sufficient specification in the plea, you may then be at liberty to do it. I find this to be the text law as laid down in the Decretals, in a case of an *alibi* referred from *England* to *Rome* for decision (*a*). *Panormitan* (*b*) also lays down the rule to the same effect. And he goes on to state, if there has been a failure of due specification in the original articles, "*tunc admittitur.*" And it is the true rule, that if a fact, material in the case, has been pleaded without such specification, as would enable the party to apply his defence to it, by way of counterplea, and he is therefore in some degree taken by surprize, on the particulars stated in the depositions of the witnesses, it is in the discretion of the Court, under great caution, to allow him to give in a defensive plea after publication. But it would relax the rules of evidence in a way liable to abuse, and open to perjury, if I permitted that fundamental rule to be departed from, and, after publication of evidence, on a plea laid with sufficient specification, suffered the matter to be the subject of re-examination, merely because the witness had deposed circumstantially, and so as to be capable of being contradicted on some incidental points; as there can hardly ever be a cause in which some of the witnesses will not disagree with others on trifling circumstances.

(*a*) Decret. Greg. lib. 2. tit. 20. c. 35. Mynsinger in loc. p. 68.

(*b*) "Sed tamen falsitas directa admittitur post aperturam propter oblivionem debitæ specificationis articulorum." Processus Jud. Ord. tit. "*Probatio formæ*," *et seq.*

Evans v. Evans.

2d July 1790.

imminent danger; and on the next day several marks and bruises were very plainly to be seen on various parts of her body.

There are three women, therefore, who are vouched in this case; that is, this *Bobillier*; there is likewise a person of the name of *Glover*; and there is *Tomlins*. And this is the only fact of barbarity to which *Tomlins* is called to depose: she speaks to all other circumstances of Mr. *Evans*'s behaviour towards his wife with the utmost partiality.

It appears to me, that if the witnesses were to prove every thing laid in the exceptive allegation as to Mr. *Mason*, it would amount to no more than to shew him to be mistaken, and not to shew that he is a corrupt man. I therefore reject that article, and direct his name to be struck out of the general introductory article, in conformity to what I have before observed. Another witness objected to is *Benjamin Frazer*, the butler.—Some parts of his evidence are recited, to which a direct contradiction in fact is pleaded, but others, which are mere matter of appearance, and so incapable of precise contradiction. What he has stated, as matter of fact, may effect his credit, if satisfactorily contradicted, and therefore, I admit so much of this article as may establish such contradiction; but I reject the rest; and the article must be reformed accordingly.

With respect to the exceptions which are opposed in this allegation to the other witnesses, *Glover*, *Newland*, *Tilbury*, and Dr. *Denman*, they are (a) all reducible to one or other of the general heads, on which I have already observed. They either assign contradictions, which do not involve any impeachment of credit, or they apply to specifications, which ought not to have been introduced into the depositions—or are so imperfect, as not to afford the means of defence, and, on that account, will not be received as evidence; or they lead to re-examination, on points which have been already fully in issue between the parties, and which ought, therefore, not to be examined to again. There are parts of the depositions where the witnesses have spoken definitely as to time. I do not say

(a) This remark was confirmed by detailed references to the allegation and depositions.

that

Evans *v.* Evans.

2d *July* 1790.

tiality. As to *Bobillier*'s testimony, I have already expressed myself in pretty strong terms of the opinion which I entertain of the truth of any assertion which comes from that witness; and therefore, certainly, in weighing this business, I shall pretty much lay her out of the question. I will only just observe upon one circumstance, which shews pretty clearly the degree of alloy with which her evidence must be considered as debased. She describes herself as *coming into the room at midnight, and finding Mrs. Evans in the situation stated in the libel,* and to which she speaks very fully. She then says, that *after Mr. Evans had retired, and with great unconcern* [certainly a very odd appearance for a man to assume, taking the story to be real], *she staid with Mrs. Evans till two o'clock in the morning, when Mrs. Evans recovered from her state of insensibility.* So that this poor lady, according to *Bobillier*, had been lying in this deplorable state from midnight till two in the morning, and then awaked to give an account of what had happened to her!

Now it is positively sworn by *Tomlins*, that *the lady was actually restored, and that she herself had taken Mr. Evans's night-clothes into another room; that she was afterwards called in by Mademoi-*

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that the conclusion of the cause might not be rescinded, in order to counterplead where they have thus spoken. But when they have spoken indefinitely, I shall not permit a contradiction to what does not, in itself, amount to evidence.

With these considerations, I reject the particular articles mentioned, and direct the names of the witnesses in the rejected articles to be struck out of the general article, and shall suffer the rest to stand for admission when reformed.

Evans v. Evans.

2d *July* 1790.

selle Bobillier, and was ordered to deliver a letter, which was written to be sent to Mr. Thackeray, AT ONE IN THE MORNING! and it does so happen, that Mr. *Thackeray* himself deposes, *that this letter bore date at one.* Yet this witness, in order to augment this transaction, pretends to state, that it was not till *after two* that Mrs. *Evans* awoke, and that consequently it must have been after two that that conversation took place between her and Mrs. *Evans*, which produced the writing and the sending of this letter. However, the account given lies between *Glover* and *Tomlins;* and the account that they give, in substance amounts pretty nearly to this:—That Mrs. *Evans* was found certainly in a situation of apparent distress; what produced that distress *non constat;* for every thing had passed in the room between Mr. *Evans* and herself before any body was admitted. One witness says, that *her mouth was full of blood.* The other witness says, that *she saw nothing of blood.* The account given of what had passed *in recenti facto*, is given to me simply upon the credit of the *French* lady; and I am decidedly of opinion to take no fact upon the credit of that witness alone. I am then not ascertained, by that witness's singly telling me so, that Mrs. *Evans* did at that time give this account.—That there had been something of a struggle, in the course of which Mrs. *Evans* fell out of bed, or threw herself out of bed, or was thrown out of bed by Mr. *Evans*, these are the three possibilities which might have happened. But, supposing I got at it as a fact, that she was actually shoved out of bed by Mr. *Evans*, I must still go farther, in order to establish a case of cruelty; for I must go to the extent,

EVANS v. EVANS.

2d July 1790.

tent, that this was done intentionally, and not by accident. Both the fact and the intention must be proved, to make it a case of cruelty; I certainly shall not presume circumstances in order to make out such a case.

It has been asked, and very properly asked, Don't courts of justice admit presumptive proof? Do you expect ocular proof in all cases?—I take the rule to be this—If you have a criminal fact ascertained, you may then take presumptive proof to shew who did it;—to fix the criminal, having then an actual *corpus delicti*. Shew me, then, in this case, that a crime has been committed, and I shall not be at a loss to fix the criminal: but to take presumptions in order to swell an equivocal fact, a fact that is absolutely ambiguous in its own nature, into a criminal fact, is a mode of proceeding of a very different nature; and would, I take it, be an entire misapplication of the doctrine of presumptions. This fact, then, not being a criminal one upon the face of it, and being subject to three or four different interpretations, all of which are perfectly innocent, I think myself by no means at liberty to say, that I ought by presumption merely, to make out this fact to be necessarily an act of delinquency.

However, what weighs more with me than all this, again, is, what I perpetually resort to in this case—the *evidentia rei*; the conduct of the parties: that always arises in my mind. Upon any other supposition than Mr. *Evans*'s innocence in this case, the conduct of every person who appears in the business—the conduct of the party—of the witness—of the agent—in short, the conduct of every body,

Evans v. Evans.

2d July 1790.

body, is the most unnatural that can be devised; it is directly the contrary of what every rational person in that sort of situation would have pursued. Whoever reads the description in the libel, and then recollects the extreme bodily weakness of the person who was racked and tormented, and in this variety of almost inexplicable ways, as they have been well stated to be, must suppose, that she must have continued, for many days afterwards, in a very languishing state, and in a situation of great personal hazard; that her body must not only have been greatly bruised, but must wonder that it did not appear entirely dislocated the next day. Now, where are the medical persons in this case? Was no assistance of that kind invoked? Surely Mr. *Evans* could not have prevented the interposition of aid of that nature, because the matter was immediately communicated, and consequently assistance, if necessary, must have been called in. Mr. *Thackeray*, to whom a letter had been sent, [Here again I see the finger of this busy incendiary, this Mademoiselle *Bobillier*] Mr. *Thackeray*, like an affectionate brother, comes at the first call.—There is some difference in the account of the witnesses as to the time when he came. *Bobillier* says, it *was between the hours of nine and ten.* Mrs. *Evans* comes down to Mr. *Thackeray*—one would suppose that she came in a situation of great visible peril—there is nothing of that sort, as far as I see. He enquires what was the matter—she declines at first telling him—then Mr. *Evans* takes up the matter, and begins to tell it—she stops him short, and gives the history of it herself; and the only particulars which stick

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Evans v. Evans.

2d July 1790.

upon the mind of this gentleman—a man of sense, and of strong attention to the cause of his sister-in-law—the only particulars which stick upon his recollection, and which he states to me, are, that *Mr. Evans had hurt her with his elbows, and violently shoved her out of bed.* Now, I ask, is this account consistent with the variety of tortures that were applied to this poor lady, who was racked in the way that she is stated to have been in the libel? Is it possible that these two circumstances, and these two circumstances alone, should, in such a case, remain upon the mind of this gentleman?—It is most highly incredible.

But the matter does not not rest there. The consequences, whatever they may have been, were not in the slightest degree visible. Witnesses have been examined to them: there is particularly *Jessop*, who swears, that *he saw her at dinner the next day, just as usual. Fraser saw her at dinner the next day, just as usual.* In short, she appears, upon a reconciliation which then took place with her husband, to have appeared just in her usual guise, without any alteration of body or mind. And when I have the total silence of all the persons who must have been able to speak to the fact, if it had existed as a matter of any consequence at all, I cannot help giving the whole business up, as a matter absolutely without weight or any significance whatever.

In the conversation which then took place, Mr. *Thackeray* was convinced that a separation was necessary; and then, as far as I can conjecture, was convinced of it for the first time. He accordingly proposed it. Mr. *Evans* was urgent for it. Mrs.

EVANS v. EVANS.

2d *July* 1790.

Mrs. *Evans* was violently averse to it.—Now from thence I collect three things.

First of all, that Mr. *Thackeray* never could have heard of the previous brutality which had been charged upon Mr. *Evans*; because if he had, there could have been no question but that he would have had that conviction in his mind long before.

The *second* that I collect is, that if Mrs. *Evans* had sustained these horrid outrages, it is most extremely unnatural, that she should herself have been averse to a separation; the mere love of life would have induced her to desire it. The gentlemen say, and say very truly, that it is very hard that this should be pressed to the disadvantage of Mrs. *Evans*'s character, that she was willing to continue with her husband; and so it would be: but it is not pressed to the disadvantage of her character; it is pressed only to the disadvantage of the truth of her case. Yes; but it is next said, *It was the love of her children.* Clear it is to me, from a fact which I shall afterwards mention, that it was not the desire of continuing with her children that operated in her mind, as a motive to make her feel a repugnance to the separation proposed.

Mrs. *Evans*'s counsel have made very strong appeals to the humanity of the Court, and have said, what a prodigious cruelty I should commit, if I were to send this lady back again to this gentleman, after such cruel usage. There would be some colour for that, if I did not find that this lady herself, after almost every thing which they have stated to the disadvantage of this gentleman had passed, nevertheless remained firm in her attachment, and remained extremely desirous of continuing the cohabitation.

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In the *third* place, it seems to me highly unnatural, that Mr. *Evans*, if I am to consider him as a person labouring under the conviction of this deep and detected guilt; it appears, I say, extremely unnatural that he should be the party to assume the tone of complaint, of disaffection and dissatisfaction; and should be the person to clamour for a separation. As to his declining to state his grievances to Mr. *Thackeray*, I own I see many reasons why he might decline doing it, without any impeachment either of his own innocence, or of the honour of the gentleman whose jurisdiction upon that occasion he thought fit to decline. If a man has a dispute with his wife, which turns upon facts that are in controversy between the two, I do not think the relations of the wife are the proper tribunal before whom the husband is bound to answer.

This quarrel, however, was made up, yet it was but " *gratia male sarta ;*" for, after cohabiting together for some time longer, their harmony is again interrupted by an act, or an accident, which happened at the latter end of *November*. It is related by Mrs. *Newland* and by Mrs. *Webber*. For as to *Bobillier*, I say again, that no credit is due to her.

It is, as is pleaded in the libel, to this effect:— That *at the latter end of November, or beginning of December, Mrs. Evans being in the drawing-room of their house in Conduit Street, in company with two ladies and her eldest daughter, Mr. Evans came into the room and seated himself on a sofa, and asked her what book she was reading: that thereupon she immediately went to him with great good humour, and, by way of answering his question, continued to read*

Evans v. Evans.

2d July 1790.

read aloud a part of the book which she had before been reading; upon which he pulled her on his knee, where she sat some short time, when he, without any cause or provocation whatever, in great passion, suddenly and violently, and with his greatest force, threw her from him on the hearth-stone, and thereby greatly hurt and bruised her.

The account given by the two witnesses whom I particularly point out in this case, Mrs. *Newland*, a sister of Mr. *Evans*, and Mrs. *Webber*, who is a particular friend of Mrs. *Evans*, is this:—

Mrs. *Newland* does not depose at all as to the fact of throwing down, for she did not see it. All that she saw was, that Mrs. *Evans* came and sat upon his knee; that he complained of the interruption of something that he was reading; and the next thing she saw was, this lady rolling upon the hearth. So that her evidence, taking the whole of it, cannot affect Mr. *Evans*. Well, but it is said, from her account it nevertheless appears that, immediately upon the occasion, Mrs. *Evans* brought home the charge to Mr. *Evans*; for, as Mrs. *Newland* deposes, on his offering to assist her up, she said, "*You brute, let me alone.*" Mrs. *Webber* says, that Mrs. *Evans* expostulated with him in a mild manner, when he offered to assist her; but the manner is this, "*You brute, let me alone.*" And *she then rolled from him, and got up without assistance.*

Now, taking it that Mrs. *Evans* did suppose, at this time, that it was the intentional act of Mr. *Evans*, still her supposition is not sufficient for the Court to raise an evidence of actual intention upon it. Mrs. *Evans*, prone to take offence, might perhaps ignorantly ascribe that to design which was

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the mere effect of accident. To take that, then, for the true representation of the fact, upon the single ground of her supposing it so, would, I think, be going a very dangerous and unreasonable length of admission indeed.

But what is the account Mrs. *Webber* gives of this business? She speaks very imperfectly to a great deal of what passed. She admits her hearing not to be very good. She says, however, *she saw Mr. Evans lift up his knee, as she could plainly discern, and Mrs. Evans then fell down upon the hearth before the fire, near to which Mr. Evans was sitting; on which the deponent, who was very much frightened, screamed out, and said, Good God, Sir, how could you do so? or, how could you be so cruel?*

In the first place, supposing the fact that this lady did actually see what she says she did see; is it at all a necessary conclusion, or what have I to satisfy me, that this small motion on the part of Mr. *Evans*, which possibly might have been made with an intention to dislodge his wife from her seat, was yet done with the intention of producing the consequence which it produced, namely, that of tumbling her down upon the hearth and hurting her considerably? She comes and seats herself upon his knee. She enters into a conversation with him. A husband is not always in a disposition to converse with his wife. She upon that occasion continues there. He makes a motion to dislodge her from her position, and this consequence happens, that she falls upon the hearth. He immediately, as it appears, attempts to give assistance, which she repulses in the way that Mrs. *Newland* says, "*You brute, let me alone.*" The other witness, Mrs. *Webber*, says, that she upon

EVANS v. EVANS. 2d July 1790.

upon the occasion exclaimed, *Good God, Sir, how could you do so?* to which he answers, *He did not intend it;* which answer this lady chuses to call an *equivocal* answer, but which appears to me as *direct* an answer as could be given. Is there any thing like an equivocation, or ambiguity, in that answer?—Taking the utmost of the fact, then, upon the evidence of these two witnesses compounded together, for, as to weighing minute circumstances, there is no end of it, there might be perhaps a little want of caution, a want of some little attention at the time, just at the moment of removing this lady from his knee: but that there was an intention of cruelty; that there was an intention that this lady should be affected by the slight motion, to which perhaps he involuntarily had at that time recourse; I have nothing in the world that applies to my mind, with any degree of force whatever, to satisfy me that it was so.

But, what was the effect of this fall? And here again I resort, as I must do from beginning to end, to the conduct of the parties—That is the key by which, I think, every thing here is to be unlocked. Why, Mrs. *Evans* had been, it seems, reading a novel for the entertainment of the company—This accident, as tragical as almost any that happens in a novel, happens at this time; and what is the consequence of it? What is the impression it makes upon the mind of Mrs. *Webber* herself at the time? Why, having given a detailed account of this cruel transaction, she goes on to say, that *she remembers she regretted much the entertainment that she had lost by the discontinuance of the reading of the novel.* That is her impression. The lady sees an act of horrid barbarity performed, and what is uppermost

permost in her mind is, the loss of the reading of this novel, which had been the entertainment of the evening. However, it did happen that she was not even deprived of this entertainment, because she goes on to say, *that Mr. Evans staid in the room, and he read the novel.* Then I have this fact, that, after an act so brutal as this was, these ladies not only continued in the room with the monster, who had been guilty of it; but submitted to receive from him the entertainment which they had been prevented, by his behaviour to Mrs. *Evans*, from receiving from her. I do think, then, that the coming afterwards and representing such a matter as this with any degree of gravity, is absurd and ridiculous in the highest degree.

It must also be observed, that Mrs. *Evans* herself came down that night after supper; and it has been made a proof of great barbarity on the part of Mr. *Evans*, that he observed to a gentleman who supped there that night, *that the poor thing was not very well.* Now, that depends entirely upon the manner of saying it, whether it is to be taken as an expression of insult or of condolence; of the condolence of a very affectionate husband, sorry perhaps that he had not practised all the care and attention, in that matter, which an affectionate husband might have wished to have done. He might then have very well said, *the poor thing was not very well.* But that it was done with any intention to insult her feelings—to be sure, the manner in which this Mrs. *Webber* has deposed to her own feelings on the occasion, abundantly satisfies me that it could not be done with any such intention.

EVANS v. EVANS.

2d *July* 1790.

Now, here concludes the history of personal cruelty, so far as it consists in personal and corporal acts. An history very heavy and formidable in its commencement, whilst it rests in mere *allegation*; but which grows weaker and more insignificant every step as it advances towards *proof*. Comparing the charge and the proof, I think it, then, my duty to discharge that debt which the justice of this Court owes to the character of Mr. *Evans*, by declaring, that, upon the most careful and the most conscientious investigation of it, this prosecution, so far as it respects these facts, is unadvisedly and unwarrantably brought. I therefore fully exculpate him from that charge of unmanly cruelty, which is founded upon these facts; and I do very sincerely regret, that, under any advice, this poor lady should have preferred so black an accusation against her husband, and one so totally destitute of all reasonable colour.

On the 23d of *December*, Mr. *Evans* took the resolution of finally separating from his wife. It is pleaded in the fourteenth article of the libel, that *he did arbitrarily, and without any cause or provocation whatever, deprive his wife of all government in his family, and authority over his servants; and that he did, on or about the 23d of December* 1788, *finally withdraw from her, and without cause.*

From stating the deprivation of authority first, and the separation afterwards, one would suppose that he had deprived this lady of authority in his house, before he quitted it himself; and to that effect, *Tomlins* positively swears;—that "*some* "*time about the fourth of October, he gave her* "*orders not to obey Mrs. Evans, but to obey other* "*persons,*" who are there mentioned. This, however,

Evans v. Evans. 2d July 1790.

ever, is erroneously and carelessly stated; because it is most positively contradicted by all the other servants who are examined—*Odell, Fraser, Glover, Jessop;* all of whom are examined upon the thirteenth article, and who say, that this deprivation of authority did not take place while Mr. *Evans* continued in a state of cohabitation with her. However, there is a fact which comes out upon the evidence of *Odell,* and it is this; that Mr. *Evans* had taken into his own hands something of the department of the house economy: I don't think it very clearly appears what.—It is upon the third interrogatory, to which she answers, that *Mrs. Evans declined giving orders, when the respondent applied to her, soon after her first going to live in her service, which was, I think, upon the first day of November, and told her to go to her master; that she would not take the management of the house; that, as Mr. Evans did part he might do the whole: and she could not then settle her bills; in consequence of which he took the management of all his household concerns; and on a new servant coming, the respondent told Mrs. Evans of the servant's coming to be hired; but she would have nothing to do with it, on which Mr. Evans hired her; and he did not, to her knowledge, refuse to permit her to hire a maid-servant, or to do any other domestic office of that or the like nature.*

The counsel have taken up this quarrel pretty strongly in behalf of Mrs. *Evans,* and have inveighed very loudly against the barbarity of a husband, for taking into his own hands any part of the family economy; but, in my apprehension, a good deal without reason. I cannot call it cruelty, if a gentleman chuses to settle his weekly bills

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Evans v. Evans.

2d July 1790.

himself; because, I take it, that a wife acts in this respect not by any original right, but as the steward and as the representative of her husband. And if a man has but a moderate opinion of his wife's management, and is vain enough to have a better of his own, if he does chuse to take into his own hands the payment of the weekly bills, I protest it does appear to me to be that kind of conduct with which no magistrate, ecclesiastical or civil, has any right to interfere. I say, I see nothing in that; but I do see, here again, on the other side, a proneness to take offence; a disposition to revolt; a disposition to return a supposed insult by something very like disobedience.

On the 23d of *December*, Mr. *Evans* took the resolution of finally separating from his wife. There had been for a time growing dissensions, which had frequently ripened into proposals for a separation; and these proposals, which had always come from Mr. *Evans*, had been withdrawn upon the interference of friends, and the parties had become half reconciled.

In *September* 1788, he had very abruptly quitted Mr. *Thackeray*'s, where he had been upon a visit with his wife; and he proposed a separation in a letter, the contents of which are stated in a great measure, by Mr. *Thackeray*. Now, there could have been no fact of cruelty at that particular time, which gave occasion to the desire of a separation; because Mr. *Thackeray* swears that *he does not know the occasion of this quarrel*, though it clearly happened at his own house. It could then, have been no more than mere private disagreement. In the separation proposed was this circumstance, that *he had acceded to her having the charge of the*

the children. After this, I can never surely admit it to be said, that the reason why this lady chose to remain with her husband was, *an apprehension that she might be debarred of the comfort of her children;* because, the terms of the separation then proposed were, *that she should have the charge of the children.* Mr. *Thackeray*, very prudently anxious for a reconciliation, as I think he was, supposing him ignorant of all these atrocious facts of cruelty, he, after all this, wrote a letter to Mr. *Evans* — stating what? — " *Mrs. Evans's un-* " *easiness, and her anxiety for a reconciliation;*" though she was then either in possession of the children, or at least had the possession of them absolutely secured to her. It is impossible, then, for me to suppose one moment, after this, that her anxiety for a reconciliation proceeded from any thing else than an attachment to her husband.

Mr. *Thackeray* says, he requested a meeting; Mr. *Evans* declined it, but desired the means of meeting a third person, after Mrs. *Evans* had agreed upon a separation. I see nothing that is at all particular in that. It seems to me a proper caution on his part, that he should have desired to have his family controversy submitted rather to the judgment of a third person, than to the judgment of a person, who, though a very honorable man, was yet, it is to be remembered, the brother-in-law of Mrs. *Evans.* However, a reconciliation was effected at this time, and the parties lived together again until *October* the 4th, when the accident happened which I have before described.

Then again Mr. *Evans* insists, as he always does, upon a separation. He is the party always insisting upon that. Mr. *Thackeray*, for the first

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EVANS v. EVANS.

2d *July* 1790.

time, then yields to the necessity of the case; though he clearly yields with a good deal of reluctance. However, by the good offices of Mr. *Henniker*, they are again half reconciled.

On the 23d of *December*, Mr. *Evans* withdraws himself totally, taking with him the person of his eldest daughter; and offers to Mrs. *Evans*, in a letter, which has my notice, because it has been noticed by the counsel on both sides, a settlement of £500 a year. The letter, though written in the height of irritation, does not insinuate that species of misconduct with which she has been improperly charged in his allegation; it only charges her with intolerable manners.

Here, I think, that an impropriety, for the first time, attaches on the conduct of Mr. *Evans*; for Mr. *Evans* must be informed, that the law of this country, and of every Christian country, does not allow a man to use the language, "*I will be separated from my wife.*" — If Mrs. *Evans* had been guilty of any misconduct for which the law would decree a separation, he would be perfectly right in withdrawing himself; but, in all cases where the law does not pretty positively allow, it pretty positively, I believe, condemns.

Marriage is the most solemn engagement which one human being can contract with another. It is a contract formed with a view, not only to the benefit of the parties themselves, but to the benefit of third parties; to the benefit of their common offspring, and to the moral order of civil society. To this contract is superadded the sanctity of a religious vow. Mr. *Evans* must be told, that the obligations of this contract are not to be relaxed at the pleasure of one party. I may go farther;

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EVANS *v.* EVANS.

2d *July* 1790.

they are not to be lightly relaxed even at the pleasure of both. For, if two persons have pledged themselves, at the altar of God, to spend their lives together, for purposes that reach much beyond themselves; it is a doctrine to which the morality of the law gives no countenance, that they may, by private contract, dissolve the bands of this solemn tie, and throw themselves upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.

There are, undoubtedly, cases for which a separation is provided; but it must be lawfully decreed by public authority, and for reasons which the public wisdom approves. Mere turbulence of temper; petulance of manners; infirmity of body or mind, are not numbered amongst those causes. When they occur, their effects are to be subdued by management, if possible, or submitted to with patience; for the engagement was *to take for better, for worse:* and, painful as the performance of this duty may be; painful as it certainly is in many instances, which exhibit a great deal of the misery that clouds human life, it must be attempted to be sweetened by the consciousness of its being a duty, and a duty of the very first class and importance.

Mr. *Evans*, in determining to quit his wife, does that which the law does not approve, and for which it provides a remedy. But the remedy is certainly not that which is sought for in the present suit; the remedy is the *remedy of restitution.* It would be absurd to suppose that the law which furnishes that remedy, furnished at the same time another remedy which is totally the reverse of it,

Evans v. Evans.

2d July 1790.

and totally inconsistent with it. To say that the Court is to grant a separation, because the husband has thought fit to separate himself, would be to confirm the desertion, and to gratify the deserter; and the Court would then become the perpetual instrument of these voluntary and illegal separations.

I can never, therefore, make desertion a ground of separation, though, in conjunction with acts of cruelty, it frequently is; and, though it may be thought hard to send a wife back to a husband who has given her such a proof of alienated affections, yet the Court does not send her back without due care for her reception; for the monition is, not only *that he shall take her back*, but *that he shall treat her with conjugal kindness;* and though the Court cannot interfere in the minute detail of family life, for much must ever be left to the consciences of individuals, yet the Court will see its monitions so far obeyed, that the great obligations of conjugal duty shall be complied with.

What I have to say upon the remaining part of this case will be comparatively short, because every thing that follows in this history arises out of this act of separation; and I have already said, that this suit is not the proper remedy for a complaint for separation. The true remedy cannot be obtained by this suit; for, it is a mistake to say, as it has been said on this occasion, that, in the present suit, I can issue a monition to either party to return. This suit can lead to no such sentence.

Mr. *Evans* quits his wife, and, in that respect, does an improper thing; that improper step is followed by others of the same nature; for there is no such thing, and one has often occasion to observe

observe it, as doing an improper thing with strict propriety. He is charged with having denied to his wife access to her child. If the fact were true, though he certainly might do it, yet I should deem it a most improper exercise of the marital power, very disgraceful to the person who practised it, and a most wanton and unnecessary outrage upon the feelings of a mother. But the evidence, as far as it goes, does not, in my apprehension, support the imputation. In his letter he expressly engages that access shall not be denied. Mr. *Henniker*, who carried that letter, knowing its contents, is to be considered as guarantee of that engagement. As to the letter mentioned by *Bobillier*, of a contrary effect, I take that to be one of the many fictions with which that lady has thought fit to adorn her evidence. And as to the taking her away to a boarding-school, though I do wish it had been done with less privacy, and less precipitation, as that would certainly have been more prudent; yet the placing of the child in a place of education, does by no means prove that he meant to debar her the sight and access of her mother; and therefore I do not hold that fact to be proved in this case.

EVANS *v.* EVANS.

2d *July* 1790.

When Mr. *Evans* quits his wife, he withdraws not, as is insinuated in the libel, a proper contribution to the support of his wife; but he does withdraw, I think, a proper mode of making that contribution. He commissions his agent, Mr. *Jackson*, in conjunction with Mr. *Evans* senior, to furnish all necessaries for Mrs. *Evans* and the family; he offers £500 a year separate maintenance; and this furnishing of necessaries was, as I understand Mr. *Jackson*, merely provisional till

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Evans *v.* Evans.

2d *July* 1790.

some settlement was actually made. He leaves directions with the servants, of which a copy is exhibited, certainly drawn in terms sufficiently peremptory, in which he refers those servants, for all orders to Miss *Evans*. Now this is, certainly, a situation of dependence and indignity in which Mrs. *Evans* is placed. It is putting her, for the supply of her necessities, into the hands of his sister and his solicitor. But then, I must remember the fact, that *Odell* says, that at this time Mrs. *Evans* had abdicated the government of the family, in consequence of the offence which she had taken at some conduct of Mr. *Evans*. She had refused to carry on the family business. Somebody must take care of the house. If Mrs. *Evans* would not undertake it, perhaps Miss *Evans* was as proper as any body else. To be sure, if Mrs. *Evans* had at this time signified her desire to act as mistress of the house; if she had remonstrated at this moment against this entire transfer of domestic authority, there would have been ground of complaint; but I think Mr. *Evans*, under the circumstances, had no reason to presume, that she would have done that under a state of separation, which she had refused to do, living in conjunction with him. Though I think it is a degradation under which she ought not to remain; yet I cannot help thinking that she has herself very largely contributed to place herself upon that footing.

It is charged, in the next place, that he deprived her of all pecuniary credit. I should be unwilling to remark, that, if proper supplies were furnished by the attention of Mr. *Evans* senior, and Mr. *Jackson*, credit was not absolutely necessary. However, the proof of the fact is this; that Sir *Herbert* *Mack-*

Mackworth, his banker, and Mr. *Boehm*, were forbid to furnish her with money, as proved by Mr. *Moore*, without his written order. Now, I protest that I have never understood it to be a part of the prerogative of a wife, that she shall have a right to draw for what she likes upon the banker of her husband. The purse is her husband's; and it seems to me a matter of indifference, in its own nature, whether the supplies pass through the hands of Sir *Herbert Mackworth*, or Mr. *Jackson* and Mr. *Evans*. It is necessary, undoubtedly, to supply her with money; but the mode of doing it by a banker, I suppose, is not absolutely necessary: I do not take it to be perfectly usual. He had indulged her before with an unlimited liberty of this kind, which, upon the separation, it is proved he withdrew. That under the present circumstances he should not leave her an unlimited power of drawing upon his banker, nobody could wonder. And as far as £500 a year went, he professed, and gave every evidence of sincerity in those professions, that he was ready to leave her that power. No proof, here again, is offered that Mrs. *Evans* ever requested any money of him. If a husband, upon request, refuses to furnish necessaries, either by himself or his agent, undoubtedly he is culpable; but if a wife does not think fit to make any request or demand, it is going too far to fix upon a husband cruelty, merely because he refuses one particular mode of supplying her with money, and which mode he was never bound under any circumstances to practise; but which in the present case, as far as it appears, he has never even been requested to conform to. The fact is, that finding her credit stopped at the banker's she trusted, as well

EVANS v. EVANS.

2d *July* 1790.

well she might, to the kindness and liberality of her relations; and, without making any application to her husband, as I see, avails herself, not very advisedly, of this as a circumstance on which to found a charge of cruelty.

He is charged, in the next place, with refusing her the aid of medicine, and that, with that view, he sent Mr. *Jackson*, his attorney, to Mr. *Paumier*, to forbid him supplying her with medicines. They have both been examined, and they differ in their evidence. Mr. *Paumier* says, *he received orders from Mr. Jackson.* Mr. *Jackson* swears, *he accidently met Mr. Paumier, who asked if he was to attend her on Mr. Evans's account; that he declined giving any directions, as she had left the house*; *that he never forbid any person from giving her credit, nor was ever sent for that purpose by Mr. Evans; nor did he, nor did Mr. Evans ever, to his knowledge, forbid any person from giving her credit.* Then, I am either to suppose that Mr. *Paumier* misunderstood Mr. *Jackson*, which might easily be, or that Mr. *Jackson* delivered those orders of his own head; for he does positively swear that he was never sent with any such orders from Mr. *Evans*; and in order to affect Mr. *Evans* with this fact, he must be the orderer. Supposing it to be fixed npon Mr. *Evans*, it might still remain, I think for consideration, how far the discharging of Mr. *Paumier*, who, for any thing that appears, was not particularly desired by this lady to attend her; how far the discharging of him merely from the obligation of attending on Mr. *Evans*'s account, is to be deemed an act of cruelty; more particularly where the husband knew, as he could not but know, that she was under circumstances, where she

she was sure to receive every assistance of that kind from her relations. I do think, to call this a refusal of all necessary medical aid to a person who was ill, does seem to me to be putting upon such a business no very fair colour.

That a woman, under such circumstances as she now was placed, should not chuse to continue any longer in the house, is not to be wondered at. It was certainly a state of indignity. But, Mr. *Jackson* positively swears, that *he offered no violence; that he threatened none; that he was not authorized to do either the one or the other; and that it was a matter of considerable surprise to him when she quitted the house.* To me, however, I own, it would have been a matter of surprise, if she had continued there, considering the footing upon which she then was. Mrs. *Thackeray* swears, that *she saw two or three letters from Mr. Jackson, intimating that Mrs. Evans must quit the house, or he would take steps that would be disagreeable.* Now, taking it that Mr. *Evans* meant to have two houses, two separate establishments,—to have an establishment necessary for the wife,—to be sure a less house would be sufficient for her in consequence of this separation, and no just cause of complaint could arise, unless the house to which she was desired to withdraw was such an one as it was improper for the wife of Mr. *Evans* to inhabit; for, I cannot but say, that a husband has a right to direct the removal of his own family.

There is another matter, which has been made a pretty long subject of discussion in this case; a matter of trunks and boxes, which has been introduced into the allegation, but not into the libel. One representation is given of it by Mr. *Jackson*; another

Evans v. Evans.

2d July 1790.

another by Mademoiselle *Bobillier*: and I think I do not pay any one individual any sort of compliment, when I say, that I shall take his deposition in preference to her's.

After all, there are, certainly, circumstances sufficiently hostile attending this separation. I wish it had been conducted with more care;—with more caution;—with more tenderness, on the part of Mr. *Evans*; for care, caution, and tenderness, would have been prudence. I must however remember, that there were at this time declared hostilities subsisting;—great mutual exasperation. It was now become a contest of etiquette, of honour and spirit, on both sides. Nothing can be more clear to me, than that the husband meant to support his wife with sufficient liberality;—he had always done it;—for want of liberality is no where in the cause to be found imputable to him. However, the parties agreeing in substance, they disagree in terms; they disagree only in the nature of the security that was to be given for the allowance proposed. It is not my business to drop an opinion upon that subject; for, after what I have said, it will be sufficiently clear that it is not the business of this Court to approve at all of such separations. But, if I could with propriety for one moment abstract myself from the public situation which I am now in, and could stand in the situation of a private individual, and as the adviser of Mr. *Evans*, I should say, that the generous part would be the prudent part in such a business; and that a conduct of that nature would be that conduct, under all the circumstances, which it was most adviseable to adopt:—however, with that I have nothing to do. The spirits of the parties

parties are mutually irritated against each other; the treaty goes off upon that ground; and the refusal to adopt a particular mode of securing the allowance is to be construed a denial of all necessary support, and to be made the foundation of an accusation of cruelty.

The truth of the case, according to the impression which the whole of it makes upon my mind, is this:—Two persons marry together; both of good moral characters, but with something of warmth, and sensibility, in each of their tempers; the husband is occasionally inattentive; the wife has a vivacity that sometimes offends and sometimes is offended; something like unkindness is produced, and is then easily inflamed; the lady broods over petty resentments, which are anxiously fed by the busy whispers of humble confidantes; her complaints, aggravated by their reports, are carried to her relations, and meet perhaps with a facility of reception, from their honest, but well-intentioned, minds. A state of mutual irritation increases; something like incivility is continually practising; and, where it is not practised, it is continually suspected; every word, every act, every look, has a meaning attached to it; it becomes a contest of spirit, in form, between two persons eager to take, and not absolutely backward to give, mutual offence; at last the husband breaks up the family connection, and breaks it up with circumstances sufficiently expressive of disgust: treaties are attempted, and they miscarry, as they might be expected to do, in the hands of persons strongly disaffected towards each other; and then, for the very first time, as Dr. *Arnold* has observed, a suit of cruelty is thought of; a libel is given in, black with criminating matter; recrimination comes

Evans v. Evans.

2d July 1790.

comes from the other side; accusations rain heavy and thick on all sides, till all is involved in gloom, and the parties lose total sight of each other's real character, and of the truth of every one fact which is involved in the cause.

Out of this state of darkness and error it will not be easy for them to find their way. It were much to be wished that they could find it back again to domestic peace and happiness. Mr. *Evans* has received a complete vindication of his character. Standing upon that ground, I trust he will act prudently and generously; for generosity is prudence in such circumstances. He will do well to remember, that the person he contends with is one over whom victory is painful; that she is one to whom he is bound by every tie that can fasten the heart of one human being to another; she is the partner of his bed!—the mother of his offspring! And, if mistakes have been committed, and grievous mistakes have been committed, most certainly, in this suit, she is still that person whose mistakes he is bound to cover, not only from his own notice, but, as far as he can, from that of every other person in the world.

Mrs. *Evans* has likewise something to forget; mistakes have been made to her disadvantage too in this business: she, I say, has something to forget. And I hope she has not to learn, that the dignity of a wife cannot be violated by submission to a husband.

It would be happy indeed, if, by a mutual sacrifice of resentments, peace could possibly be re-established. It requires, indeed, great efforts of generosity, great exertions of prudence, on their own part, and on the part of those who are connected

nected with them. If this cannot be done; if the breach is too far widened ever to be closed, Mrs. *Evans* must find her way to relief; for, she must not continue upon her present footing, no, not for a moment: she must call in the intervention of prudent and respectable friends; and, if that is ineffectual, she must apply to the Court, under the guidance of her counsel, or other persons by whom the matrimonial law of this kingdom is understood.

But, in taking this review, I rather digress from my province in giving advice · my province is merely to give judgment; to pronounce upon what I take to be the result of the facts laid before me. Considering, then, all those facts, with the most conscientious care, and with the most conscientious application of my understanding to their result, I am of opinion, that Mr. *Evans* is exculpated from the charge of unmanly and unlawful cruelty. I therefore pronounce, *that Mrs. Evans has failed in the proof of her libel, and dismiss Mr. Evans from all further observance of justice in this behalf.*

LADY FERRERS *v.* LORD FERRERS.

11th *Nov.* 1788. 5th *March* 1791.

Divorce,—by reason of adultery, on the part of the wife—how *affected*—by *delay* in instituting proceedings—by *alleged condonation*, &c.—Ultimately granted.

THIS was a question on the *admissibility* of a libel in a cause of divorce, instituted by the wife against the husband, by reason of adultery, on objections which are stated in the observations of the Court.

JUDGMENT.

Sir *William Scott.*—The question before the Court arises on the admissibility of a libel, given in on the part of Lady *Ferrers* against her husband the Earl of *Ferrers*, in a suit of separation, by reason of adultery. The adverse Counsel have taken particular objections to separate articles, and also a general objection applicable to the whole. The Counsel, in support of the allegation, have given up the latter part of the fourth article, pleading a letter from Lord *Ferrers*, and the subsequent article exhibiting the letter,—the exhibit itself being in so mutilated and imperfect a state, as not to correspond with the recitement of it.

In objection to the sixth and ninth articles, which plead specific acts of adultery, prior to a connection which took place between them in 1784, it is said, that adultery should, at the utmost, in such a case, be pleaded generally; for the effect of condonation extinguishes the right of complaint, except for subsequent acts.—But Dr. *Bever* has very fully explained the effect of condonation by matrimonial intercourse*.—It is a conditional

* On the same principle, *reconciliation* was pleadable, to a charge of elopement and adultery in bar of dower. Lady *Ann Powes* v. *Herbert*. *Dyer's* Rep. fol. 106.

forgiveness, which does not take away the right of complaint, in case of a continuation of adultery, which operates as a reviver of former acts. The objection appears to be founded on a supposition, that the facts of adultery, pleaded subsequent to the condonation, would not be proved; in which case the proof of those facts, previous to the forgiveness, could not weigh.—But in debating an allegation, the facts laid are always supposed to be true. It was said, by Dr. *Nicholl*, that it resembled the case of *Bowes* and *Strathmore**, where facts of adultery, previous to cohabitation, were not permitted to be pleaded. But there is an obvious distinction between the two cases, and in this respect,—that the husband there was not aggrieved, and the fact alleged against Lady *Strathmore*, if true, could be no injury to him. But is that the case here? In respect to any expence, which may be occasioned by it, in taking out a commission for the examination of witnesses in *France*, the Court must undoubtedly guard against unnecessary charges, but all circumstances must be fully stated, and the Court is bound to admit them to proof. To say there is sufficient evidence without it, is saying nothing,—for you cannot narrow the adverse case in that way.

The seventh and eighth articles plead and exhibit a letter from Mrs. *Nicholas*, sister to Miss *Munday*, which is said to be a clear admission of *her* guilt by her nearest relation. It is objected, that if Mrs. *Nicholas* is not examined it is no evidence, and if she is, *it is* unnecessary. The first objection is well founded,—it is "*res inter alios acta.*" The admission of Miss *Munday's* guilt by

* 3d March 1789, Deleg.

 her

FERRERS *v.* FERRERS.

11th *Nov.* 1788. 5th *March* 1791.

her sister, cannot affect Lord *Ferrers*, even if on oath, which it is not. I therefore reject that article and the exhibit.

The latter part of the fifteenth article pleads, that Lady *Ferrers* has been seen by *Kirby*, *Jones*, and others—and their declarations, "that she is not "the person who cohabited with Lord *Ferrers* at "their respective lodging-houses."—But this is no evidence. They must be produced, or their unauthenticated declarations will be nugatory. This article must be reformed therefore by pleading, "that they are satisfied on their consciences, and "verily believe, she is not the same person," and on this they must be produced and examined.

The general objection is to the acquiescence of Lady *Ferrers*, from the year 1780, which is said to amount to condonation. It is contended, also, that she is barred by length of time; and that if a suit of this description was to come before the House of Lords, or before a jury, they would not sustain it. It is not my business to advert to what would be the conduct of the House of Lords, or of a court of common law. The House of Lords do not sit merely in a judicial capacity, tied down by certain rules, but as a legislative body, which has full power to act according to its own wisdom; so that their proceedings are not to be considered as mere forensic acts, but as acts of the legislature: — nor will the action at law, which is instituted, *diverso intuitu*, for the recovery of damages, apply to proceedings of this nature. It is not brought against the same person, but against the adulterer, for the injury sustained; and where the husband has not felt the injury, *no damages*, or, at least, nominal damages only, will be given.

But

But in this Court it is not the measure of the injury which is to undergo consideration, but whether the party plaintiff is entitled to a separation or not? So that the courts of common law do not afford any conclusive rule which should bind this Court in a question of this kind.

The case of *Boteler* v. *Boteler** has been mentioned; but I see a material distinction in that case. An application was there made to the Court in favour of Mrs. *Boteler*, who had brought a suit against her husband for separation. Witnesses had been examined, and publication had passed. The suit then lay dormant for seven or eight years, during which time the original depositions were by some accident lost, and application was made to the Court to hear the cause on attested copies. The Court adverted to the special circumstances of the case, and placed the question on this ground, whether Mrs. *Boteler* was entitled to any special indulgence? and so placing it, thought that she was not, and therefore dismissed the suit. But if the original depositions had been existing, there is little doubt but that the Judge would have proceeded to hear the cause.

In the case of *Cibber* v. *Cibber* †, there was an active concurrence in the husband to the guilt of the wife,—a state of fact very different from a forbearance in bringing the suit, which may not only be excusable, but meritorious, in hopes of reconciliation; and, as was observed, there is a great difference between the husband and wife on this point. The husband may, by his authority,

* Consist. Commenced in 1775, went on to 1777, *suspended till* 1788.

† Consist. 1739.

 command

FERRERS v. FERRERS.

11th *Nov.* 1788. 5th *March* 1791.

command the adherence and obedience of the wife; whereas the woman, in case of elopement and criminality of the husband, must adopt some other mode than that of compulsion. The case of *Harris* v. *Ball* *, also, stood on a different ground. That was a case of impotency, pleading a species of defect not capable of proof. The circumstance of time was also an ingredient, but not the leading one in the case, that libel being dismissed as *felo de se* upon the other ground. No case has been cited to shew that lapse of time alone is a sufficient bar †. It is impossible for me to say that this suit might

* Arches, 1788.

† So in *Dodwell* v. *Dodwell*, 13th *June* 1789, the only act of adultery pleaded was in 1782, and it was objected that acts of adultery could not be given in evidence to obtain a divorce after five years. But the Court over-ruled the objection, observing— That the objection as to time could not be maintained, as there was no limitation in suits of this nature. There had been a rule of the Canon Law "*adulter accusari non potest post quinquennium*," but that has been held to apply to criminal and not to civil suits *. It appears, indeed, from Dr. *Bettesworth*'s notes, to have been doubted at one time in civil suits. In the case of *Mule* v. *Mule*, 1710, before the Delegates, it was strongly contended that evidence to facts of adultery, which had passed more than six years, could not be read, but the objection was over-ruled, and the law is now settled otherwise.—Over-ruled.

* *Sanchez*, lib. x. desp. 3. § 9. Lex Julia Dig. lib. 48. tit. 5. sect. 29. p. 6.

In *D'Aguilar* v. *D'Aguilar*, 5th *November* 1793, the libel pleaded acts of cruelty in 1773; and an objection being taken to the libel on the ground of time. The Court observed—This is a suit brought by Lady *D'Aguilar* against the Baron, the parties *being Jews*, and married according to the *Jewish* rites: But the Court is under the same obligation to interfere and grant aid on violation of any duty arising out of such marriage, as well as any other. An objection is taken to the libel, that the facts are very ancient, and that they had been buried in silence for many years, and that it would be proper to exclude

might have been brought before, consistently with prudence; and I will not lay it down as a rule, that a woman, not bringing her complaint immediately on the discovery, shall be afterwards barred from laying her case before the Court.

FERRERS *v.* FERRERS.

11th *Nov.* 1788. 5th *March* 1791.

This cause went on, and was ultimately terminated 5th *March* 1791, by the judgment of the Court pronouncing for the divorce, as prayed on the part of Lady *Ferrers*.

exclude such complaint, by analogy to the statute of limitation. There might be more force in the objection, if it was not taken off by the subsequent conduct of the parties. If the wife had lived in the society of her husband, it might be improper to take notice of a complaint of such ancient date: But it appears that she was obliged to leave him, and lived separate till 1792. The effect of that separation, though not regular and formal, or under the authority of the Court, rebuts the inference of acquiescence, and affords a ground of presumption that her life had been rendered uncomfortable, and that she had been obliged to seek an asylum with her friends.—But there had been a condonation by a reconciliation in 1792—and it is said, that though this might be taken away by subsequent facts, they must not be slender facts, but such as would be sufficient to found a sentence. This is the true rule. But I think the facts pleaded are such as might avail substantively, and therefore that they may revive the ancient facts.—Libel admitted.

In *Mordaunt* v. *Mordaunt*, 1st *June* 1794.—On restitution of conjugal rights.—The libel pleaded the marriage 27th *February* 1759; desertion of husband in *April* 1759: that he left *Ireland* and came to *England*, where he remained concealed from the wife till he was lately discovered, when being required to receive his wife, he refused.—On objection to pleading desertion at such a distance of time, the Court said,—It knew of no limitation of time: There was none imposed by statute, or by any rule which the Court had laid down for itself. It was not in its power to refuse relief on that ground.—Libel admitted.

PERTREIS *v.* TONDEAR,

FALSELY CALLING HERSELF PERTREIS.

3d *Feb.* 1790.

Marriage in the parish church, or some public chapel, required by 26 G. 3. c. 33. s. 1. *Exception*, as to the chapel of a Foreign Embassador, between foreigners, *not* being of the Embassador's country, *not admitted*.

THIS was a cause of nullity of marriage; on the ground, that it was not celebrated in the *parish church, or in a place* where marriages had *been usually* solemnized, according to the provisions of the marriage act; the marriage having been celebrated in the chapel of the *Bavarian* Embassador, without banns or licence, and between persons not being of the Embassador's household, nor of his Country.

In support of the marriage, it was argued, that there was nothing in the libel to shew that the marriage was invalid: that when an attempt is made to dissolve a marriage, it ought to appear on the face of the libel, that it could not be valid: that it was not sufficiently pleaded, that there was no special licence, but only "that the marriage was had without "banns, and without licence from persons having "authority." A chapel of an Embassador is to be considered as part of the country to which the Embassador belongs; and, in that character, is excepted, under the clause of the marriage act, which relates to foreign marriages. A marriage between *English* persons celebrated in the Embassador's chapel in a foreign country, where the parties might be only *in transitu,* and not domiciled, would be held to be good. It is not contended, that two *English* subjects could marry in an Embassador's chapel

Pertreis v. Tondear.

3d Feb. 1790.

chapel here, since they must conform to the law of *England;* but, in this case, the man is a foreigner, living in the house of the *Spanish* Embassador; and the woman appears also from her name to be a foreigner, and it is not shewn that she was domiciled in *England.*

In reply, it was said, that the form of pleading, as to the licence, included the licence of the Archbishop; and, on the general law applicable to such a case, reference was made to a former precedent of *Heinel* v. *Fierville* *, in which a marriage was solemnized in the *Venetian* Embassador's chapel, without consent, one of the parties being a minor. In that case the Court gave sentence interlocutory, rejecting the formal sentence porrected, and pronounced the marriage invalid, on the ground that it was celebrated in a place where banns had not usually been published.

Judgment.

Sir *William Scott.*—This is a suit for nullity of marriage, brought by *Pertreis* against a person calling herself *Pertreis,* but whose real name is charged to be *Tondear,* under the alleged invalidity of their marriage. The libel states that clause in the act of parliament, whereby all marriages celebrated in any place, unless where banns are usually published, shall be null and void. The second article pleads, that the marriage was celebrated in the chapel of the *Bavarian* Embassador, where banns of matrimony are not usually published, and without banns or licence. It has been said, that a

* Consist. 1783.

sentence

PERTREIS v. TONDEAR.

3d Feb. 1790.

sentence of nullity is an unfavourable one, and discretionary on the part of the Court, and that the Court, if it be discretionary to grant or not, would naturally decline it. But it is not my opinion, that this Court has any such discretion on this subject. Every person interested, who thinks there is a legal defect, may apply, and has a right to a declaratory sentence, if his application is well founded. It may be necessary, for the convenience and happiness of families, and of the public likewise, that the real character of these domestic connections should be ascertained and known. An observation has been made, that the citation suggests minority, which is not pursued in the libel.—But the party having abandoned that plea, and not proceeding on the double ground, as in *Heinel* v. *Fierville*, whether she was a minor or not at the time of celebration, is not material.

The next objection is, that the marriage is stated to have been had without banns or licence, but without negativing that it might be by special licence. But the words "*without licence*" are sufficient, and will comprehend every kind of licence; and in *Heinel* v. *Fierville* it was pleaded in the same manner.

The principal objection, however, is, that this act of parliament will not operate under the circumstances of the case; for that the House and Chapel is to be considered as the *Country* of the Person residing there, to which our law will not extend. But the authority of the case, which has been cited, sufficiently decides this question, so as to oblige me to admit this libel. The party who proceeds was in the suit of the *Spanish* Embassador, and not of the *Bavarian*;

PERTREIS v. TONDEAR. — 2d *Feb.* 1790.

Bavarian; and the other party, though she has the name of a foreigner, is not described as being of any Embassador's family, and has been resident in this country four months, which is much more than is necessary to constitute a matrimonial domicile in *England*, inasmuch as one month is sufficient for that under the act of parliament. Supposing the case, therefore, to be assimilated to that of a marriage *abroad* between persons of a different country, it is difficult to bring this marriage within the *exception*, as this woman is not described as domiciled in the family of the Embassador. Taking the privilege to exist in Embassador's chapels (which perhaps has not been formally decided), I may still deem it a fit subject of consideration, whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the Country of the Embassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shewn that she had been living in a house entitled to privilege during her residence in *England*. On these grounds I shall admit the libel. The matter may receive further illustration of facts, which may entitle it to further consideration.

This cause stood on *assignations to prove*, till 2d *April* 1792, when it appears that nothing further was prayed, and it is presumed that the cause was discontinued.

NASH *v.* NASH.

6th *May* 1790.

Felonious acts, on *what principles* admitted, and under what limitation allowed to be pleaded in the Ecclesiastical Courts.

THIS was a cause of divorce by reason of adultery, brought by the husband against the wife. The parties had separated by agreement. The libel charged the woman with cohabiting in an adulterous intercourse, and also pleaded a *pretended* marriage with the adulterer; and exhibited a copy of the entry of such marriage. It was objected that this marriage being *bigamy*, and a *felonious act*, could not be pleaded in the Ecclesiastical Courts.

JUDGMENT.

Sir *William Scott.*—In this libel, given in a case of adultery, an objection has been taken to an article which pleads a marriage between the party accused of adultery, and a certain person with whom she is pleaded to cohabit in an adulterous intercourse, under the assumed character of wife, and to have so done for a considerable time; *and* it is said, that the crime of bigamy, being a felony, is improper to be pleaded before an Ecclesiastical Tribunal, where it is not triable; and many good cases have been cited by Dr. *Lawrence* tending to shew that this Court cannot inquire criminally into cases, where it could otherwise inquire, if not cognizable at common law.

Certainly

NASH v. NASH. 6th *May* 1790.

Certainly this Court cannot inquire into a felony directly, even where a clergyman is sued *for the purpose of deprivation**. And in a late determination of *Cummins* v. *Mayo*†, the allegation, which was exceptive to witnesses, a species of plea upon which the Court always entertains some jealousy, charged a witness with *felony* in direct terms, and was properly on that ground rejected. But it is very frequent, and has so occurred in the course of practice, to admit a fact *in itself* criminal to be pleaded, as a necessary fact of the evidence in a civil suit. Such is the case in causes of nullity of marriage by reason of a former marriage. There was also a late case in the Arches, where the parties were married, and signed the entry of marriage by fictitious names, which it is felony to do‡; yet that consideration was held not to bar the right of the party to proceed to a sentence of nullity in a civil suit, though it would, equally with the present case, have subjected the party to a prosecution

* 12 *Jam.* 1.—" *Searle* had been tried at common law and found guilty of manslaughter, whereupon he was questioned to deprivation before Doctor *Bird*, Judge of the Court of Audience, when he desired to be admitted to his defence, that he was not guilty, contrary to the verdict. Dr. *Bird* came to me for direction, and we agreed, that felony or other capital crimes were not examinable in the Ecclesiastical Courts; no, not for purposes that were examinable there, as in this case of deprivation; and therefore they may not originally examine such a crime to prove *a man criminous*, much less, when he is so proved in the proper Court, impeach the sentence in the proper Court. But they may build a sentence of deprivation upon such a conviction, and they are bound by it." *Hob.* p. 121.—In the case of *Bromley* v. *Bromley*, Delegates, 1794. This form of pleading the conviction was adopted in proceedings for divorce by reason of sodomitical practices, of which the husband had been convicted.

† Prerog. 28th *April* 1790.

‡ 26 *G.* 2. c. 33. s. 16.

by

NASH v. NASH.

6th *May* 1790.

by statute for the felony. There was another case of a person who had been guilty of altering a licence, which would have amounted to the crime of forgery. The marriage, in the present case, though amounting, if criminally prosecuted, to what the law describes as felony, will afford a strong presumption, and go in corroboration of the other evidence that may be offered as to the charge of adultery; for, if the parties have gone so far as to perform the ceremony of marriage in a church, and they have since lived together ostensibly as man and wife, that fact, so assisted by the subsequent cohabitation, is strong presumptive evidence of an adulterous intercourse, and will fix it. It is, therefore, proper to be pleaded. As to the length of time which has elapsed without the husband having brought his suit, *that*, undoubtedly, comes under another consideration of the Court; but there is, as has been rightly observed, no legal limitation, and there may be reasons of discretion which may make him so far passive:—*that* has never been held to amount to a condonation;—which is effected by the return of the parties to live with each other; nor has a separation by articles or agreement ever been considered as a bar to a suit of this kind *. Another objection has been made to

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16th *Nov.* 1798.

* *Beeby* v. *Beeby*.—In this case, being a cause of divorce by reason of the adultery of the wife, it was objected that the libel shewed that the parties had lived in a state of separation, and that it was not competent to the husband to bring a suit of divorce, as he would not at common law be allowed to bring an action for damages. But the Court observed,—That separation is not considered by the Ecclesiastical Court as a bar to divorce for adultery, either previous or subsequent to the act alleged. It was not an answer to such a charge, even in cases of malicious desertion. But in cases of voluntary separation, it would be more unreasonable that the wife

to one of the articles, for want of sufficient specification in point of time,—it pleading "*that some time in the course of the year;*"—but, taken with the cohabitation which follows, I think it is admissible. If it shall be proved that the parties were married together, and lived in a state of habitual cohabitation, it is, in a case so composed, an averment sufficiently distinct, under the latitude which such circumstances give to a case of such a nature. *

NASH *v.* NASH.

6th *May* 1790.

* Affirmed on appeal, 27th *Jan.* 1791.

wife should be at liberty to impose a spurious issue on the husband. The Ecclesiastical Court (*a*) does not look on articles of separation with a favourable eye; but they are not held so odious as to be considered a bar to the charges of adultery.

In the case of *Woodcock* v. *Woodcock*, the act of adultery alleged, was committed during separation. 5th *Dec.* 1801.

(*a*) See the principles of the Courts of Common Law and of Equity on articles of *separation*, *St. John* v. *St. John*, 11 Vesey, p. 526. *Beard* v. *Webb*, 2 Bos. & Pul. p. 93. *Marshall* v. *Rutton*, 8 T. R. p. 545.

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

Recrimination, in a suit of divorce by reason of adultery, alleged in bar, &c.—Party dismissed.

THIS was a case of divorce, brought by the husband against the wife, by reason of adultery, in which recrimination, as pleaded in bar of the relief prayed by the husband, was much discussed in the observations of the Court.

JUDGMENT.

Sir *William Scott.*—This is a very melancholy case, arising on a prosecution brought by the husband against the wife to be relieved from the obligation of cohabiting with her, by reason of her adultery.

The libel states the marriage between the parties in *Jamaica,* which is confessed, so that nothing arises on that part of the case.—For near ten years after, she had behaved in the most exemplary manner, fulfilling the duties of a wife and mother in a way that defied all reproach.—It is with great concern the Court sees a defection from virtue, which it must admit to be proved.—The libel charges facts of adultery, and states the history of a criminal connexion, commenced at *Lisle* in 1787:—Witnesses have been examined, and it is, I repeat, with considerable concern that I am compelled to say, there is no doubt of the fact being proved by which the charge is supported.—The proof principally arises from the evidence of *Sarah Walker,* who was in attendance upon her at *Lisle,* and afterwards in *England,* and was privy to most of the transactions. It is proved by her in a manner to exclude all reasonable doubt, that there was an intimacy of an extra-

extraordinary nature between her mistress and a Mr. *Mussell,* that commenced at *Lisle.*—This witness is produced on both sides, and therefore not subject to impeachment from either. She proves a correspondence by letters from *Canterbury*, and a private meeting between the parties at *Egham* at night, clandestinely, and without the knowledge of the husband. An elopement takes place, and they are traced to different places in this town—particularly to the *White Bear* in *Piccadilly*—which is corroborated by *Purser,* the maid there, who knew *Mussell* personally, and proves his cohabiting there, at that time, with a female answering the description of Mrs. *Forster*. There are acknowledgments of the guilty connexion expressed in letters of her own writing, which are exhibited.—There is a verdict giving only a shilling damages, but which certainly affirms the proof of the fact by giving any damage at all. In short, there is a combination of proofs, which would make it a mere waste of time to observe minutely and particularly upon them.

The defence set up consists, first, of a denial of the facts, upon which it is unnecessary, after what I have just observed, to make a single remark—secondly, a species of justification arising from the similar misconduct of the husband, which certainly is not at all inconsistent with the plea of denial; for it is fairly open to the party to say in the same breath, "*I have not committed adultery; but if I* "*have, you have barred yourself from the remedy* "*you pray, by your own misconduct of the same* "*species, for though adultery cannot be justified* "*in itself, it may be legally justified against you, by* "*the proof that you have produced the evil of which*

FORSTER v. FORSTER.

6th Dec. 1790.

"*you pretend to complain.*" — A third plea of defence offered, but with less effect, is, that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say *with less effect*, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this Court for the protection of a separation by reason of cruelty: And if the ill treatment is not of that gross kind, against which the law would relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time, though such a plea has no absolute effect, it has a very proper relative effect, where infidelity, on the part of the husband, is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appears that his affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects. A fourth defence is, that he has connived at, encouraged, and promoted his own dishonour; for, in that case, the general rule of law comes in, that *volenti non fit injuria*, no injury has been done, and therefore there is nothing to redress.

Having dismissed the first ground of defence, *the denial of the fact*, I proceed to the second, founded on an asserted principle of law, which withholds from a guilty husband the remedy against a guilty wife. Something has been said as if this ought not to be the law: With that question I have nothing to do; for I must take the

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

the law as it is, and I shall therefore content myself upon that matter with observing, that it appears a good moral and social doctrine, which I have not the inclination, if I had the power, to innovate. It is unquestionably the rule of this Court. The principle is found in the Roman law:—"*Viro atque uxore invicem accusan-*"*tibus, causam repudii dediisse utrumque pronun-*"*tiatum est: Id ita accipi debet, ut eâ lege, quam*"*ambo contempserunt, neuter vindicetur: paria*"*enim delicta mutuâ pensatione dissolvuntur.*" * "*Judex adulteri ante oculos habere debet et inqui-*"*rere, an maritus pudicè vivens, mulieri quoque*"*bonos mores colendi auctor fuerit. Periniquum*"*enim videtur esse ut pudicitiam vir ab uxore exi-*"*gat, quam ipse non exhibeat.*" †

It could not be applied *directly*, in That system of law, to the immediate subject of divorce, because divorce being a matter altogether within the authority of the husband himself to dismiss his wife, the magistrate could have no power to apply any such principle to that transaction. But if the wife applied for dower, of which the magistrate had the cognizance, and the husband pleaded her adultery in bar of her demand, she had a right to object to the husband his own adulteries in bar of that objection. The magistrate then applied those principles which, expressed in the general terms in which they appear, must have governed the case of divorce itself, if the magistrate had possessed a jurisdiction that reached to that subject: For there is nothing that saves that subject from the reach of that principle of compensation, but that the subject itself is out of the reach of the magistrate. The canon law, therefore,

* Dig. 24. 3. 39.

† Dig. 48. 5. 13. 5.

which

FORSTER v. FORSTER.

6th Dec. 1790.

which attributed to the Ecclesiastical Magistrate the jurisdiction of divorce, carried this principle* along with it for the exercise of his authority.

It appears from *Gibert's Jus Canonicum* †, that this rule of *compensatio criminum* was not received in *France* ‡, but it is undoubtedly received in *England;* and in the case of Lord and Lady *Leicester*, in 1737, was unanimously recognized by all the Delegates, as the standard canon law of this country in all cases of divorce; and so in all other cases. Where a wife is prosecuted *criminally* for adultery, not for divorce, but *ad publicam vindictam*, it can not be pleaded; for there the public, and not the husband, is the injured party, and it can be no excuse for the wife's breach of the good order of society, that her husband had done so before her, whatever it might be in a mere civil prosecution instituted by himself §. Taking the law, therefore, to be clear, I have only to examine how far the evidence supports the charge of the husband's criminality, with the satisfaction of knowing, that if it does, I am relieved from the necessity of inquiring minutely into the other pleas of defence.

This proof arises from the testimony of several women. First, *Faris*, who says, " *That about nine " years ago, she went to live with Mr. and Mrs. " Forster, and that, in the morning of the third day " after her arrival at their house at Egham, she*

* X. 5. 16. 7. † P. 121. § 4.

‡ This may be connected with the principle in the *French* law, " that adultery, committed by the husband, is not a ground of " divorce or separation on the part of the wife." *Pothier*. vol. 3. p. 177.

§ So under the Lex Julia " Quæ res potest et virum damnare, non rem ob compensationem mutui criminis inter utrosque communicare. Dig. L. 48. Tit. 5. 13. § 5.

" *went*

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

" *went into a room, up one pair of stairs, to open " the windows, supposing it was a spare room, and " seeing the window curtains down, she drew them " up, and proceeded to a bed in the room, and drew " back the curtains, and was then surprised at seeing " her master awake in bed; that he then imme- " diately put his arm out of bed, and laid hold of " her arm, and said something she does not now " recollect, and looked her in the face, on which she " begged his pardon, being flurried, and imme- " diately left the room: That Mrs. Forster had not " then arrived from Southampton, and that soon " after Christmas, she was directed by Mrs. Forster " to go to clean a house at Englefield Green, where " they afterwards resided, which she did. It was a " ready furnished house, but no person then resident " in it, and Mrs. Forster said, Mr. Forster said she " must go there, and she went and slept there alone " for about a fortnight; and about three o'clock in " the afternoon of a Sunday, during that time, Mr. " Forster came to the house alone, and the deponent " went over the house with him, taking an account of " the furniture; and that, in the last room they went " into, no other person being in the said room, he " tempted her, and said to her, 'Did not you come " into the world for the use of men?' and she said " to him, 'It was a sin; that he had a wife; that she " was a poor girl, and what would become of her?' " That he said, 'What is matrimony? a man with a " black gown preaching before you, that is nothing; " that he wondered such a girl could withstand such " temptations;' and said, 'I hope you will consider " of it.' To which she said, 'I hope you will.' " And he then left her: That about a week after- " wards she returned to Egham House, and about*

 "*five*

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

"*five days afterwards, he came into his dressing-*
"*room, where she was cleaning the stove, and as she*
"*was going out of the room, he laid hold of her, and*
"*said, 'Have you considered?' To which she replied,*
"*'Sir, if I have not considered, I hope you have,'*
"*and immediately left him. And afterwards, on the*
"*same day, up stairs, he asked her if she had no*
"*victuals in the house, and gave her two half*
"*guineas; and the witness being asked, agreeably*
"*to the contents of the allegation, whether he had*
"*carnal knowledge of her? says, she is ready to*
"*answer every thing fair, but such questions as that*
"*she does not choose to answer.*"

Taking the witness to have spoken true, it is a decisive proof of corrupt inclinations and endeavours on the part of Mr. *Forster;* and I see in it enough to induce me to infer, that there was no absolute want of corrupt inclination in her, and moral conviction would not hesitate to draw the conclusion, however legal reasoning might be compelled to pause.

The same witness goes on to say, "*that about*
"*six years ago, she being then a married woman,*
"*with a child in her arms, met Mr. Forster, and told*
"*him, on his noticing her, that she heard he wanted*
"*somebody to clean the house, and she should be*
"*glad to come and do his work; and he appointed*
"*her at four o'clock the next day, when she went,*
"*and accompanied him to the different rooms, where*
"*he told her to follow him, and said he would tell*
"*her what she should do, and he turned down the*
"*bed-cloaths, and desired her to mind all the beds,*
"*and particularly in the yellow room, where he gave*
"*her half a guinea*" And the witness being again asked, "*whether he had not then, and frequently, carnal*

knowledge of her? replied as before, "that she does not choose to answer." He asked her, if "she could recommend him to any body, she says she "could not." FORSTER v. FORSTER. 6th Dec. 1790.

Thus stands the evidence of this witness, leading to a conclusion, which every man's private conviction must draw, even if it presented itself singly; but it derives confirmation strong, from proofs furnished by other females, on whom similar attempts have been made in a course of conduct familiar and habitual in this person.

Ann Slark, who is a nursery maid, says, *"that "about nine years ago, the family, who were all "at Bath, went out, but Mr. Forster would not "go with them, and he did not; but the witness "being in the act of warming his bed at night, he came "from an adjoining room undressed and in his shirt, "and said he would kiss her, on which she screamed "out and ran away."* An attempt certainly of great indecency in the master and father of a family.

The next witness is *Sarah Walker,* who has been examined as well by the husband as by Mrs. *Forster.* —She says, *"that on a day when her mistress was out, "she being in her said mistress's bed-room, was desired "by Mr. Forster to go with him into a room up stairs "to look at some curtains, in which room there were "several spare beds, and she, not suspecting his intention, went, and after having opened and looked at "some spare furniture, he took hold of her by the "shoulders, and endeavoured to throw her down on "the beds; that she struggled very much with him, "and having also hurt his arms by pinching him, prevented his throwing her down; and, having disengaged herself, she said, she would tell Mrs. "Forster of his conduct, which he begged she would*

 "not,

FORSTER v. FORSTER.

6th Dec. 1790.

"*not, and promised never to take liberties with her*
"*again; and she says, she has no doubt it was his*
"*intention to have committed adultery with her, if*
"*he could have prevailed upon her.*"

Another young woman says, "*that when she first* "*went to live in his service, about two months after* "*Mrs. Forster went to France, she took some water* "*into his library to wash his feet; upon which he* "*locked the door, and said he would not let her go,* "*unless she would promise to let him into her bed-* "*room at night; and when she had retired to her* "*room, which she locked, heard him knock at the* "*door, and he said, she had promised to admit him,* "*to which she replied, that she did not mean it, and* "*he continued at the door nearly half an hour: and* "*afterwards at another time, he held out his hand to* "*her with money, which she struck away, and beat* "*out of his hand, saying, she neither wanted him or* "*his money.*"

In these cases I am to understand that he failed in his endeavours; but failed from no want of purpose or activity on his own part, but from an honest and powerful resistance on the other. These instances therefore furnish a strong corroboration to the conclusion to be drawn from the other case, where it is evident that no such resistance was to be apprehended, and where the conquest, by such arguments, and solicitations, and bribes, and his bodily force, all of which were used, must be presumed to be easy. But even if no such definitive presumption attached, I should be inclined to hold that the general conduct of the husband, as shewn, is quite sufficient to support a plea in bar, though not sufficient to support an original accusation of adultery. For it is a principle that

 runs

FORSTER v. FORSTER.

6th *Dec.* 1790.

runs through a variety of cases, that many things are good for the one purpose, though deficient for the other. The husband, who enters the Court with a criminal imputation on the conduct of his wife, must purge his own conduct of all reasonable imputation of the same nature; and, if he complains of her impurities, must be untainted by any gross impurities of his own. It is a satisfaction to find this doctrine, in the case alluded to of Lord *Leicester* and Lady *Leicester*, laid down by the able person who then presided in the Court of *Arches*, the elder Dr. *Betlesworth*. In an accurate note of his judgment, I find it expressly laid down, "that, where adultery was pleaded, by way of recrimination only, to bar, it was not necessary to prove such strong facts against the plaintiff, as would be required to convict the other party in a suit for divorce; for, to obtain a sentence of divorce, the husband must have a pure character."

Let me apply this observation to the present case. Here is a woman for ten years acting irreproachably; exemplary in her conduct as a wife and a mother, and who, after gross neglect and gross provocation on the part of the husband, falls at last a victim to the arts of a seducer. In the mean time, what has been the behaviour of the husband? Planting corruption most sedulously all around him,—soliciting the chastity of his female servants, by every art of profligacy that he could apply,—converting his own house into a brothel, and even engaging these females in the employment of finding for him other objects of his criminal gratifications. Surely this is not the man who can call out, in a court of justice, against the unfortunate delinquency of his wife: He cannot be listened to on any such complaint.

 After

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

After what I have said upon this point, it is unnecessary for me to travel much into other parts of the case. Upon his general treatment of his wife, I will content myself with stating the deposition of Mr. *Stephenson*, a man at a grave time of life, in a grave profession, being the medical attendant on the family, and having nothing to prevent him from making his observations in the most dispassionate manner. His account is this, "*That she was a very pleasing and agreeable woman, and, as far as he ever saw or observed, always behaved with as great propriety and tenderness towards her husband and children, as a man would wish to see;—that Mr. Forster treated her with great indifference and inattention, not to be expected by a young handsome woman, as Mrs. Forster was, every way qualified to make an agreeable companion to a man who treated her with affection;—that, in* 1785, *he learnt, in consequence of a question he necessarily put to Mrs. Forster, that Mr. Forster had withdrawn himself from her bed, at which time she appeared to him to behave with great propriety; and he knows of no cause or provocation for his so withdrawing himself.*"

Most certainly, what Dr. *Harris* has said is true, "That the duty of matrimonial intercourse cannot be compelled by this Court, though matrimonial cohabitation may." This species of malicious desertion is a ground of divorce in some countries,—certainly not so *here*,—and still less will it justify a wife, in a resort to unlawful pleasures, that lawful ones are withdrawn. It is not however to be considered as a matter perfectly light in the behaviour of a complaining husband, that he has withdrawn himself without cause, and without consent, from the discharge of duties that belong to the

very

very institution of marriage; and if he has so done, he ought to feel less surprise, if consequences of human infirmity should ensue.

FORSTER v. FORSTER.

6th *Dec.* 1790.

I have to observe likewise, that his marital conduct is, in the present instance, in the highest degree *inofficious*. A husband is expected by the law to pay a due attention to the behaviour of his wife, and to give her the benefit of some superintendance, where she is placed in dangerous situations. He sends her to *Lisle*, a *French* garrison town, amongst *French* officers living with the known profligacy of that profession in that country, and the resort of dissolute persons both of our own and other countries. He had a confidence, it is said, in the discretion of friends, whom he placed about her; and of those friends, Mr. *Mussell*, who was one, does not appear to be entitled to any high panegyric on account of *his* attention to her conduct. This clearly appears from her own letters, that she was the object of criminal pursuits. Mr. *Forster* is made acquainted with the amorous billets which she had received from the *Monsieurs*, as they are there called. One of her letters speaks of an attack almost by force; still Mr. *Forster* does not think it necessary to repair to her, but lingers two months in *England*, though such attempts of *French* gallantry upon his wife had become matters of general conversation, and even of general merriment, in which he was not indisposed to join unreservedly. It would lead to a suspicion that events, which have unfortunately been produced, were the very events intended to be produced. At any rate, there is a want of that delicate sensibility, of that prudent attention, of that honest caution, which belong to the character of a husband. A Court of

FORSTER *v.* FORSTER.

6th *Dec.* 1790.

Justice is not the first place in which that sensibility should be shewn.

The verdict has been little alluded to; and I only observe, the rate of damages given by the Court cannot be accounted for, on the common grounds on which very small damages are sometimes given: They are given here for the stigmatizing purpose — to establish the fact, but to establish the fact to be no injury to the individual who presumes to complain of it.

The case will probably travel to places where it will receive decisions from superior authorities, possessing superior lights. It is my duty to form my present judgment upon my own view of the case, and certainly not without an anticipation, that the same view will be entertained of it by all who may have occasion to consider it hereafter. If I am mistaken in that, it will become my duty to conclude that I have formed an erroneous judgment upon its real merits. But I have the satisfaction of thinking that I pronounce at least an honest judgment, in declaring, that this party had no right to institute this suit, and that his wife is dismissed from all further attendance in this Court.

In this case an appeal was prosecuted to the Court of Arches, in which two further allegations were admitted on the part of the husband. An appeal was afterwards interposed on the part of the wife from an interlocutory order of that Court, to the Court of Delegates, in which a further allegation on her part was admitted. On the final hearing, 6th *July* 1797, the wife was dismissed from the original citation, and all further observance of justice.

THE DUKE OF PORTLAND *v.* BINGHAM.

26th *Jan.* 1792.

Licence to preach in *Quebec* chapel in *Mary-le-bone*, not allowed to be impeached, by proceedings on the part of the Impropriator, in a civil suit—*he* not shewing an interest that would entitle him to maintain such a suit.

THIS was a case arising upon a decree taken out by the Duke of *Portland*, as lay rector, impropriator, and parson of the rectory and parish of *St. Mary-le-bone*, against Dr. *Bingham*, citing him to appear and bring in a licence granted by the Bishop of *London*, authorizing him to perform the office of joint *Sunday* preacher in a chapel in *Quebec Street*, in the said parish, and to shew cause why the same should not be revoked, as unduly, illegally, and surreptitiously obtained.*

The case was argued by Dr. *Harris*, Dr. *Laurence*, and Dr. *Nicholl*, on the part of the Duke of *Portland*; and by Dr. *Arnold* and Dr. *Swabey* for Dr. *Bingham*.

Dr. *Bingham* appeared under protest, alleging, "that the Duke of *Portland*, as lay rector, &c., "has no interest or right whatever to call on him "in such a cause; and that, by the law and practice "of the Court, he is not bound to answer in this "suit; but that if he has preached without being

* The citation was to the following effect: "More especially "for publicly reading prayers, preaching, and administering the "Holy Sacrament, and performing other ecclesiastical duties, "and divine offices, according to the rites and ceremonies of the "Church of *England*; in a certain building newly erected, and "never before used for celebration of Divine Service, situate in "*Quebec Street*, in the parish of *St. Mary-le-bone*; under colour "of a certain licence, by him illegally and surreptitiously obtained, under the Episcopal Seal of *London*; and also then "and there to bring in the said licence, and to shew good and "sufficient cause, if he has or knows any, why the same should "not be revoked, and declared null and void."

The Duke of Portland v. Bingham.

26th Jan. 1792.

"duly and legally authorized, and the Duke of "*Portland*, or any other person, was minded to "proceed against him, it should be by a criminal "suit." To this it was answered, "that the Duke "of *Portland* had sufficient interest to call for the "production of the licence; and the object of the "suit being not penal, but only to revoke the li- "cence, as unduly obtained, and in violation of "the rights of the Duke of *Portland*, the present "suit was regularly brought."

JUDGMENT.

Sir *William Scott*.—Upon the proceedings in this cause, as they have been stated by the Counsel, these facts appear, first, That the purpose of the suit is solely to assert the right and interest of the Duke of *Portland*. Secondly, That his asserted rights are those of lay rector, parson, and impropriator. These alone are suggested to be affected in this case. Thirdly, That there is a licence in the possession of Dr. *Bingham*. It is alleged, that the interest of the Duke of *Portland* may be affected by the exercise of the office of Preacher in this chapel by Dr. *Bingham* under this licence, and that the licence has been surreptitiously obtained.

The instrument is as solemn and perfect in form as any instrument can be, and as regular in the way in which it has been obtained. There are not two ways of acquiring such instruments, as there may be in other matters. In probate of wills, for instance, there is one form, which is slight and summary, for ordinary and undisputed cases, and another more formal, by solemn decree of the Court; and it is usual, where the former mode only has been observed, on due occasions, to call on the parties to bring in the probate as surreptitiously

The Duke of Portland v. Bingham.

26th Jan. 1792.

titiously or unduly obtained. Here all the solemnities which the law can impose for the case have been observed; and though I cannot say that such an instrument may not be revoked for proper cause, it must certainly be a clear and sufficient cause. It cannot be on a mere possible interest only, that it ought to be disturbed. If it is to be impeached by third parties, it must be on clear evidence of some interest of theirs, that is affected by the grant; since it would be extremely hard to put a person who is apparently in full legal possession of such an instrument, on proof of its validity, at the call of any one, who may allege a possible interest only in the grant. Dr. *Bingham* claims no title in this chapel, and may therefore be entirely unprovided with documents to repel any claim that may be set up.

There are other interests indeed in which every man partakes, such as that of maintaining public order, &c. These are clear and direct, and universal, and will entitle any one to institute proceedings to preserve that order. But such proceedings must be *ad publicam vindictam*, and by criminal articles exhibited in due form, which is the usual way of trying such matters as the present, and the most convenient. In that course the question would be reduced to one point only—the right of the party who is the object of such proceedings; whereas, in *civil* suits, a previous question may arise, of equal difficulty, on the right and title of the person instituting the suit. This then is an important distinction; and I know of no case of civil proceedings of this kind, and none has been mentioned in the argument, but that of *Lyne* v. *Harris* *, which, as far as it

* Arches, 1750.

goes,

The Duke of Portland v. Bingham.

26th Jan. 1792.

goes, taking it with deductions on account of irregularity, imports in the *Party*, there *proceeding*, a right which will not be denied. In that case there was a civil injury sustained, but I am not satisfied with the reasons that led to this mode in the present case. There can be no consideration of delicacy respecting the person, in the nature and consequences of criminal proceedings, that should make *this* form of *civil proceeding* necessary, or expedient, since the *form* and *phrase* of the proceedings only are criminal, where they are had to try a civil right: They are so understood by the Court, and convey no imputation on the party, and are not necessarily accompanied with costs. The civil form has been adopted in this case; and it is not for the Court to consider so much whether it is expedient, as whether it is competent? If competent, it can only be on the ground, that the licence affects or directly tends to affect the interests of the complaining party; *that* inquiry will therefore be the first object of the attention of the Court.

The licence authorizes Dr. *Bingham* simply to be "*joint Preacher*," and not to *officiate generally*, nor indeed in a chapel under the legal Church Establishment, for it is called a *pretended chapel*,—nor authorizing the administration of sacraments or sepulture, or conferring any title to fees, oblations, or obventions, &c. It does not, therefore, interfere with the legal dues of the Incumbent. For though the service, under such licence, may intercept *mere voluntary* contributions; and though this consequence might be an object of consideration with the Court, where the title of the party in the particular church was established on any

legal

legal foundation,—it is not so clear that such diversion of mere voluntary contributions, will constitute that direct civil injury, which can properly be made the subject of civil proceedings in the Ecclesiastical Court.

The case of *Lyne* v. *Harris* is not analogous; for that was a proceeding instituted by the Vicar of a Parish with a Chapel annexed, against a party officiating in that Chapel, which the Vicar claimed as part of the Parish Church. There was therefore a direct interest in the emoluments of the Chapel. And the authority of that precedent is by no means conclusive, as to a case in which there are no such interests capable of being alleged as the foundation of the suit.

That a Bishop licensing a person to preach within a parish (*not* in the Parish Church, for *that* is clearly and entirely in the Incumbent), ought to hear the Incumbent first—is a proposition generally true: and it is generally true, likewise, that the consent of the Incumbent, to the erection and use of a Chapel, is requisite. No decision, that I know of, has gone the length of laying down, that, even in the case where the necessity of an increased population was urgent, and where the consent of the Incumbent has been obstinately and causelessly withheld, the Authority of the Bishop, who certainly has the general *cura animarum* throughout the whole of his Diocese, could yet be interposed to remove the obstruction. When such a case arises, it may require grave consideration, to find the proper remedy, against so improper an abuse of the general rights.

This is not, however, the case of a Spiritual Incumbent. The Duke of *Portland* does not claim spiritual incumbency—he does not expressly claim the patronage of the mother church, or of the

Chapel

The Duke of Portland v. Bingham.

26th Jan. 1792.

Chapel—but it is said, that as lay Rector, impropriator, or parson, being a layman, he has some, or all of these rights.—Nothing can be more clear than that, as *lay rector*, he has not cure of souls, in fact, or in presumption of law.—For, as to what is said in some books, that he may have it, *habitualiter*, it is a distinction which more properly applies to cases of another description, where there is a Spiritual Rector * but *sine cura*, and an endowed Spiritual Vicar of the same Church, who has the *cura animarum*, *actualiter*, whilst the other is said to possess it only *habitualiter*.

The foundation of that opinion, that the lay rector had the *cura animarum*, *habitualiter*, is a dictum of Mr. *Noy*, in argument in the case of *Britton* v. *Wade* †, referring to passages in the year books, which, to my apprehension, hardly appear to convey any such meaning. The case of *Clerke* v. *Heath* ‡, was one in which there was a Spiritual Rector, and endowed Vicar, in the same parish, in which it was held, that both may have cure of souls, making institution the necessary foundation of such cure: and I think the effect of this reasoning, is strongly against the claim of a lay rector and impropriator.

It must be evident to any one, who considers the history of impropriations, that a lay rector cannot have cure of souls: And the statutes § of dissolution having directed that impropriations || should

* "Quand il n'y a plus d'habitans dans une paroisse, soit que "les guerres, soit que quelque autre raison, les ait fait disperser, "le benefice est une cure, que les canonistes appellent, *cura* "*habitu*."—Loix Eccl. de France par M. de *Hericourt*, p. 203.

† 3 *Cro. Jac.* 518. ‡ 1 *Mod.* p. 13. 2 *Keb.* p. 484. 1 *Sid.* p. 426.

§ 27 *Hen.* 8. c. 28. 31 *Hen.* 8. c. 13.

|| *Impropriate* is used as synonymous with *appropriate*, 1st *Eliz.* c. 19. See also 1st and 2d *Phil.* and *Mary*, ch. 4. In a petition to

The DUKE of PORTLAND v. BINGHAM.

26th *Jan.* 1792.

should be held by laymen, as they were held by the religious houses from which they were transferred, it may be convenient that this point should be a little more fully considered.

There is some confusion in the books, in not always distinguishing between two sorts of appropriation, which were fundamentally different. Appropriations are an abuse which took their rise in the darker ages. They are termed usually in the canon law "*annexiones, donationes, uniones,*" &c., and the term *appropriation,* which was borrowed from the form of such grant "*in proprios usus,*" appears to have been peculiar, or principally confined to *England.* *Ducange* cites a letter from *England,* in which it is used *: It is seldom indeed to be found in any foreign canon without reference to this country, and there is scarcely a foreign writer who, in noticing it, does not say, *quas in Anglia vocant appropriationes.*

There were two sorts of appropriation, or rather appropriation was authorized to be made, with different privileges, in two forms †, the one *pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus,* where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other, *non utroque jure,* though *pleno jure,* as it is described, *in temporalibus,*

to Parliament, temp. *H.* 8. the *term* is *impropried;* and in the 10th *Henry* 6th, for further enforcing 15 *Ric.* 2. c. 6. and 4 *Henry* 4. c. 12., which did not receive the Royal Assent, the terms are "Benefices held *in proper use,*" so also in 15 *Ric.* 2. c. 6. See also *Kennet* Appropriat. p. 131. As these last instances were before the dissolution of religious houses, there appears to be no real distinction in the origin of this term, though it may have prevailed subsequently in common use, as *to interests of this kind,* in the hands of LAYMEN, as mentioned by *Ayliffe,* p. 90. *perhaps* from *Spelman,* Tithes, p. 137.

* Gloss. p. 592.

† X. 5. 33. 3. Panormitan et Hostiensis, in loc. cit.

 where

The DUKE of PORTLAND v. BINGHAM.

26th Jan. 1792.

where temporal interests only were conveyed, such as the tithes or patronage of the Benefice; but the cure of souls resided in an endowed perpetual Vicar.

In the first species, the religious house had the cure of souls and all rights, and performed the duties of the Church by its own members, or by stipendiary Curates; and the distinction on this point is summarily described, in a passage, from the proceedings of the Court of Audience: "Cum ecclesia conceditur alicui monasterio, pleno jure, in temporalibus, tunc Episcopi debent instituere vicarium perpetuum; ubi vero unitur Mensæ Episcopali, vel Abbatiali, et spectat ad illam, pleno jure, tam in spiritualibus, quam in temporalibus,—tunc ponitur in ea presbyter temporalis, ad nutum removibilis, ad exercitium curæ, *quæ principaliter residet in eo cujus mensæ est unita**." This description of these two species of appropriation is to be met with, also, in frequent passages of the *Aurea summa Hostiensis*, a

A.D. 1255. learned Commentator of the thirteenth Century †.

Against holding benefices *pleno et utroque jure*, great complaints were made in the *Gallican* Church, in which on no subject was dissatisfaction more

* Vicars Plea, p. 107. *Selden* on Tithes, c. 12. *Ayliffe's* Parer. 86. *Lyndwood*, 157, 158.

† "Ubi Ecclesia ad monasterium pertinet pleno jure, habet monasterium in eâ institutionem, destitutionem, investituram, fidelitatem, obedientiam, correctionem, et quædam alia: Episcopus nihilominus desuper est; nisi privilegium, vel præscriptio, vel contraria consuetudo obest: sed ubi pleno jure non pertinet, tunc habet ibi monasterium temporalia, et repræsentationem presbyteri vicarii tantum, qui non debet ab Episcopo recipi, nisi per monachos sufficiens portio assignetur." On a further discussion, how the Bishop could grant such powers *in pleno jure*, being greater than what he himself possessed, the answer is, "non potest transferre, nisi ex causâ, puta, propter paupertatem mensæ religiosorum, quæ non sufficit ad sustentationem ipsorum," &c. Lib. 1. p. 296. et seq. De officio ordinarii.

loudly

The Duke of Portland v. Bingham.

26th Jan. 1792.

loudly or more frequently expressed. And it is mentioned, as a fundamental maxim in that Church, that, since the council of *Constance**, it has become a legitimate cause of revocation in that kingdom.

In *England* it was ordained by the constitution of *Othobon*, that all religious houses, which possessed churches *in proprios usus*, should present Vicars, with competent endowment, to the Diocesan, for institution, within the space of six months; and that if they failed so to do, the Bishop was empowered to fill up the vacancy: This however proved insufficient against the power of the monks. The Civil Legislature next interfered, and passed the statutes 15 *Rich.* 2. c. 6., 4 *Hen.* 4. c. 12., which require that vicarages should be regularly endowed. Such was the general and legal character of appropriations in *England*, by the canon law, and by the statutes of the realm. The Vicarage became a benefice with cure of souls, and the monks held *in proprietatem*, in some sort, as a lay fee. †

But after the statute of appropriations, the monks were too subtle and cunning for the law, and still nevertheless obtained appropriations, as annexed *to their tables*, as before, under the plea of poverty and inability to support themselves. These *uniones ad mensam*, for the sustentation of the monks, were always presumed in law to be *in utroque jure*, and it was an universal rule that they were never vacant, but that there was a perpetual plenarty; as it had been held, that the canon "*de supplendâ negligentiâ* ‡," which gave the right of presentation on lapse, did not apply to such appropriations. The monks, who thus may be said to have been the *immortal* Incumbents, had

* A. D. 1414, Concil. Gener. tom. 12. p. 254. Vicar's Plea, p. 4.
† *Gibson*, 719. *Mallet* v. *Trigg*, 1 *Vern.* 42.
‡ X. 1. 10. 2. Clem. 1. t. 5. Vicar's plea, 107.

The DUKE of PORTLAND v. BINGHAM.

26th *Jan.* 1792.

the cure of souls remaining in them, and the minister, whom they employed, was a mere stipendiary.

From this root sprung the peculiar kind of appropriation, without a *vicarage* endowed; and this is the origin of Stipendiary Curacies, in which the Impropriator is bound to provide Divine Service—but may do it by a Curate, not instituted, but only licensed by the Bishop; and might reckon himself under no obligation to present a Vicar to the Bishop for Institution, but might provide for the Service of the Church, as the Monks did, by a licensed Curate. Since that time, the statutes of dissolution enact, that benefices of every description should be held as they had been held by the dissolved religious houses, a grantee, who has obtained what was before held, as above described, *ad mensam, pleno et utroque jure*, would have the complete incumbency, as *intitulatus*, and *beneficiary*. If such an impropriator should take orders, he might perform the offices of the Church without institution, only taking the oaths imposed by later statutes. And it would be only the circumstance of not being in orders, that would prevent him from exercising his ecclesiastical rights, in full form, as those spiritual persons, the monks, did before. But it was not so in ordinary impropriations, in which there had been a vicarage endowed; because the Vicar holds by something extrinsic of the impropriator.

Mary-le-bone may, for any thing which the Court knows, be an impropriation of THIS peculiar kind; and the Duke of *Portland* may be the real beneficiary, and entitled to claim as such. But he has not done so in the present instance, claiming only as *lay rector*, *impropriator*, and *parson*. Now a parson has temporal rights; and the term being joined with that of lay rector, must be understood in a qualified sense, and as referring only to lay rights.

The

The Duke of Portland v. Bingham.

26th Jan. 1792.

The terms rector and parson do not add, necessarily, therefore, to the term impropriator. Then in what character am I to consider the Duke of *Portland* in this case? As *ordinary impropriator?* or as *extraordinary*—holding *utroque jure*, but standing on privileges, which, founded as they were on abuse, were yet in their own nature limited to persons possessing a spiritual character?

In the presumption of the canon law, the monks were held to be impropriators in the ordinary and common way: so says *Hostiensis*,—"Semper præ-"sumo contra Monachos, nisi authoritatem Epis-"copi probent intervenisse *." And this presumption is still more strongly fortified, in the law of England, by the statute of impropriations, and the further presumption, that the provisions of that statute have been observed. The presumptions of law then are, that the benefice though impropriated, is not impropriated *pleno et utroque jure;* and if so, that there is an endowed minister to whom the *cura animarum* belongs. It is true, that where a person claims tithes as a Vicar, he must shew his endowment, in order to shew of what he is endowed: but in him the cure of souls entirely resides. And it is clear that the Duke of *Portland*, claiming *as lay rector*, does not shew the cure of souls to be in *him*, and the legal presumption is against him.

But the right of patronage in the Mother Church, is suggested as a ground of interest. Supposing him to be necessarily patron, *vi termini*, I incline to the opinion that such right will not constitute an interest, that will sustain proceedings of this description. For what is it? A mere right to present, and therefore accompanied with all rights of action concerning the presentation. But *other* actions, respecting the interest of the Church, belong to the Incumbent, in whom the fee is, and

* Aur. Summ. p. 297.

The Duke of Portland v. Bingham.

26th Jan. 1792.

not to the patron,—except in two instances:—one where the Clerk was himself the wrong doer*; the other †, when the Benefice was vacant, and there was no one to protect the rights of the Church. These arose *ex necessitate rei*, and form therefore no precedent for other cases, not lying under similar necessity. It is not pleaded, in this case, that the Church is vacant, and it is not to be presumed;—patrons are not *generally* entitled to institute such actions. Indeed the claim is not described to be made, *as for the patron*. And though it might be shewn, that as impropriator he may be the patron, there are so many instances, in which that consequence might not attach, that it cannot be generally assumed, on mere implication of law.

As to an implied right of patronage to a Chapel, arising from the right of patronage to the Mother Church, questions have been agitated between the patron, and the rector, of the mother church, and have been not always determined in one and the same way. But the balance of authority is greatly on the side of the Incumbent, and it is, since the case of *Dixon* v. *Kershaw* ‡, considered as settled in favour of the Incumbent. In the case of *Herbert* v. the Dean and Chapter of *Westminster*, it was finally settled that the right of nomination lay in the Dean and Chapter, after a strong inclination of the Chancellor's mind to lodge it otherwise.§ But the Dean and Chapter were spiritual persons,

* *Strachey* v. *Francis*, 2 *Atkins*, 217. *Barnardiston*, 399.

† *In Hoskins* v. *Featherstone*, 2 *Brown*'s Chancery Rep. 552.

‡ *Ambler*'s Rep. p. 529.

§ 1 *Peere Williams*, 774. See also *Mallet* v. *Trigg*. The Lord Chancellor *Nottingham* observed, "There was a great difference as "to the Parson's right of naming or choosing his Vicar, where the "Parson was *of a lay fee*, and where he had *a cure of souls*: for, "in the latter case, there was reason he should approve of the "man, who was to act under him in so high a trust." 1 *Ver*. p. 42.

possessing

possessing the same rights *pleno et utroque jure*, which the abbot and monks had done before. They were actual incumbents, and served the church and chapels of *Saint Margaret* by one of their own body, and were in that character entitled to nominate. The Duke of Portland, being a *lay rector*, and being disabled by his lay character from any power of serving the church, cannot, till that incapacity is removed, enjoy the same precise extent of right, as was attributed to the Dean and Chapter in their spiritual character.

The Duke of Portland v. Bingham.

26th *Jan.* 1792.

Having thus considered the several foundations of right or interest, which have been very learnedly pressed and discussed in argument, I am of opinion that enough is not shewn to distinguish the Duke of *Portland* from other common impropriators. If he does possess rights, that would so distinguish him, they are not shewn, in the characters in which he claims; and I therefore dismiss Dr. *Bingham* from the effect of the present citation. *

By 57 G. 3. c. 98. Provisions were made for the sale of the Impropriate Rectory and right of presentation of and to the perpetual curacy of *Saint Mary-le-bone* to the Crown, with the several chapels called *Portman Chapel*, *Bentinck Chapel*, *Quebec Chapel*, &c. &c. with a view to the future division and improvement of the said Parish, as specified in the said act, and on the terms therein contained.

* A citation was afterwards taken out against Dr. *Bingham*, on the part of the Duke of *Portland*, reciting the Duke to be "*Patron, Rector, Impropriator, Beneficiary, Incumbent, and* "*Parson Imparsonee, of the parish of St. Mary-le-bone*," calling on Dr. *Bingham* "to appear and receive articles, and also to bring "in his licence, and shew cause why it should not be revoked, as "unduly obtained." Objections were taken to the form of the proceeding, under protest, which were over-ruled. Articles were afterwards given, which were also opposed, but admitted. That judgment was affirmed, on appeal, by the Court of Arches, in *May* 1793, and subsequently by the Court of Delegates, in *May* 1795. The cause was then discontinued, and nothing more appears to have been done upon it.

26th *Nov.* 1792.

The Office of the Judge promoted by HUTCHINS v. DENZILOE and LOVELAND.

9th *Feb.* 1792. Proceedings against a Churchwarden, for interfering to obstruct and prohibit the form of singing, &c. which had been authorized by the Minister, sustained.

THIS was a proceeding against the Churchwardens of the parish of *St. Botolph, Aldersgate,* at the promotion of the Rev. *John Hutchins,* officiating and licensed Curate of the said parish, by articles; and the offence was thus stated in the citation: "More especially for obstructing and prohibiting, "by your own pretended power and authority, "and declaring your resolution to continue to "obstruct and prohibit, the singing or chanting by "the parish clerk and children of the ward, and "congregation, accompanied by the organ." *

On the part of the Churchwardens, it appears to have been supposed, that, as they paid the organist and managed the children, they were to direct when the organ should or should not play, and when

17th *Nov.* Question of practice.—Whether on a citation to appear on a day fixed, and receive *articles,* etc. the person is entitled to demand that the articles shall be delivered on the first Court-day, or that otherwise he should be dismissed.—Not so held.

* In this case a question of practice arose on the prayer of Mr. *Denziloe,* who had given an absolute appearance to a citation personally served upon him, "to appear on the first day of the session," and then appeared in Court, and prayed "that the articles "should *immediately* be exhibited against him, on the same Court-"day, or otherwise that he might be dismissed." The Promoter prayed the continuance of the cause till the next Court-day, alleging it to be the practice to allow such time. The Court observed,—The grounds of the objection are very imperfectly stated in the act: It is alleged only "that the words *then* "*and there* in the citation, bound the party to time as well as "place," in criminal proceedings, although the practice is allowed to be different in civil cases; but no proof is given of the existence of such a rule, except some ancient authorities, which extend to civil cases also, and are admitted to be obsolete as to them. On reason and principle, the rule should be the same in all cases, and precedents have been cited in which time has been allowed. It is said, there was no prayer of dismissal in those cases

HUTCHINS *v.* DENZILOE and LOVELAND.

9th *Feb.* 1792.

when the children should or should not chant. The Clergyman had ordered the playing and singing at certain parts of the service.—The Churchwardens forbad both.

JUDGMENT.

Sir *William Scott.*—This is a proceeding by articles against the Churchwardens of *St. Botolph, Aldersgate*, the nature of which has been fully set forth.

The articles are objected to, on many grounds. —First, on point of form, that they are not against the proper parties; for that if it was criminal to discontinue the chanting, it was so in those who discontinued it,—in the organist and clerk; and that the threats of the Churchwardens to enforce acquiescence to their directions, would not discharge those other persons of responsibility; for though the Churchwardens might have authority to command, yet if that command was illegal, it was

cases, but when the stream of practice has flowed uniformly and silently one way, it shews almost as strongly, as decided cases, the sense of all practisers. But it is said, the rule is enforced in cases of Defamation. In that class of cases, founded on reproachful words, and mostly between the lower orders of the people, there is a strong call on the Court, to make the necessity of personal attendance as short as possible; and therefore a distinction may properly be made in such cases, under the discretion of the Court. In criminal cases, the Court will certainly expect all reasonable expedition, and will discountenance any unnecessary delay: but when a prosecutor conforms to the practice of the Court, It cannot impute criminal negligence to him. Then the only question is, Whether the party is chargeable with criminal inactivity? I think he is not: The prayer of the promoter is only "for a continuance till the next Court-day;" and although the cause began in the vacation, and there may have been time for the articles to be prepared, yet, as the practice of the Court has been understood to be otherwise, and as the party could not know what appearance would be given, I shall allow the continuance, and overrule the prayer of dismissal.

HUTCHINS v. DENZILOE and LOVELAND.

9th Feb. 1792.

was not to be obeyed. But, surely, if a command is illegal, it is a distinct misdemesnor in the person who gives it; as if a Churchwarden should give orders to remove a monument or a body, without a faculty, he may be sued in the Ecclesiastical Courts.

An objection has also been taken, that the articles do not agree with the citation, by their dropping a part of the charge *. This position makes it incumbent then to maintain, that the whole makes one charge, which is not divisible—and that taking away a single part makes a new charge, which the party had no notice to defend. The citation is divided, in fact, into two charges, which have one thing in common, that they were both obstructions to the service, but yet they were distinct obstructions. Another objection is, that no law has been set forth: to which it has been answered, that where the general law is relied on, it is not necessary that it should be specifically stated.

The real question in the case is, whether the fact charged is of a criminal nature? The charge is that of having obstructed a practice approved of by the inhabitants and by the Bishop. These are the material averments, — for the statement, that it had been done by the approbation of former Churchwardens, is of little effect, as that could

* The variance, that was stated to exist, between the citation and articles was, that in the former, the Churchwardens were called upon to answer for "obstructing the singing, in the "morning and afternoon, two sentences from the prose psalms "of *David*, and also for obstructing the singing *Gloria Patri* in "prose," while in the latter, it was only charged "that they "prohibited, by their pretended authority, the singing of the "*Gloria Patri* in prose at the conclusion of the psalms of *David*, "and in other parts of the divine service."

not

Hutchins v. Denziloe and Loveland.

9th Feb. 1792.

not in this instance operate as a rule to their successors.

The first point is, whether these Churchwardens have a right to interfere in the service of the Church? as if that interference is legal in any case, it is so in the present. To ascertain this, it is proper to consider what are their duties: and I conceive, that originally they were confined to the care of the ecclesiastical property of the Parish, over which they exercise a discretionary power for specific purposes. In all other respects, it is an office of observation and complaint, but not of control, with respect to divine worship; so it is laid down in *Ayliffe* *, in one of the best dissertations on the duties of Churchwardens, and in the canons of 1571 †. In these it is observed, that Churchwardens are appointed to provide the furniture of the Church, the bread and wine for the holy sacrament, the surplice, and the books necessary for the performance of divine worship, and such as are directed by law; but it is the Minister who has the *use*. If, indeed, he errs in this respect, it is just matter of complaint, which the Churchwardens are obliged to attend to; but the law would not oblige them to complain, if they had a power in themselves to redress the abuse.

In the service, the Churchwardens have nothing to do, but to collect the alms at the offertory; and they may refuse the admission of strange Preachers into the pulpit. For this purpose they are authorized by the canon ‡, but *how?* when letters of Orders are produced, their authority ceases. Again, if the minister intro-

* Parergon, p. 170. † c. 5.
‡ 1603. c. 50.

duces

HUTCHINS *v.* DENZILOE and LOVELAND.

9th *Feb.* 1792.

duces any irregularity into the service, they have no authority to interfere, but they may complain to the Ordinary of his conduct. I do not say there may not be cases, where they may be bound to interpose; in such cases, they may repress, and ought to repress all indecent interruptions of the service by others, and are the most proper persons to repress them, and they desert their duty if they do not. And if a case could be imagined, in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or from disorderly habits, I will not say that the Churchwardens, and even private persons, might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity, that supersedes all ordinary rules. In cases which fall short of such a singular pressure, and can await the remedy of a proper legal complaint, that is the only proper mode to be pursued by a Churchwarden,—if private and decent application to the minister himself, shall have failed in preventing what he deems the repetition of an irregularity. At the same time, it is at his own peril if he makes a public complaint, or even a private complaint, in an offensive manner, of that which is no irregularity at all, and is in truth nothing more than a misinterpretation of his own. I shall pass over a case which has been cited from the State Trials *;

* Trial at *Rochester* Assizes, *July* 1719, before Sir *Lyttleton Powys*, vol. 10. app. p. 88. fol. ed. In this case, on a collection for charity, in the Church of *Chislehurst*, the Magistrates interfered, and a scene of violence and confusion ensued. They indicted the Clergyman at *Rochester* Assizes for collecting money without authority. The Clergyman, in the mean time, instituted proceedings in the Ecclesiastical Court of *Rochester* against the persons who interrupted the offices of the Church.

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as it was one of party heat, that took place in times of party ferment, and is of smaller authority on that account.

I am next to consider whether the Churchwardens, if having authority, have interposed in this case to hinder an illegal or legal act? And in this branch of the question I dismiss all consideration of expediency, which is in the Ordinary himself alone,—the Court judges only of the legality. Has then the Bishop a discretion upon this subject? Those who have undertaken to shew that he has not, must shew a prohibition which restrains it; and in order to establish *this*, it is said, that though singing part of the Psalms is properly practised in Cathedrals, it is not so in Parish Churches. No law has been adduced to this effect, but modern usage alone has been relied on; and it is said that such has been the practice from the time of the Reformation. This, however, is not supported by any particular statement of fact or authority.

In the primitive churches, the favourite practice of the Christians to sing hymns in *alternate verses*, is expressly mentioned by *Pliny*, in one of his Epistles to the Emperor *Trajan* *. The Church of *Rome* afterwards refined upon this practice;—as it was their policy to make their Ministers considerable in the eyes of the common people; and one way of effecting *that*, was by appointing them sole officers in the public service of the Church; and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity; and it became

* "Affirmabant hanc fuisse summam vel culpæ suæ, vel erroris, "quod essent soliti, stato die, ante lucem convenire, carmenque "Christo, quasi Deo, dicere secum invicem."—Ep. tit. 10. 97

HUTCHINS *v.* DENZILOE and LOVELAND.

9th *Feb.* 1792.

became the distinguishing mark of the Reformers, to use plain music, in opposition to the complex musical service of the Catholics. The *Lutheran* Church, to which the Church of *England* has more conformed in discipline, retained a choral service.* The *Calvinistic* Churches, of which it has sometimes been harshly said, "that they think to find religion wherever they do not find the Church of *Rome*," have discarded it entirely, with a strong attachment to plain congregational melody,—and that perhaps not always of the most harmonious kind.

The reformation of the Church of *England*, which was conducted by authority, as all Reformations should be, if possible, and not merely by popular impulse, retained the choral service in Cathedrals and collegiate Chapels. There are certainly, in modern usage, two services to be distinguished; one the Cathedral Service, which is performed by persons who are in a certain degree professors of music, in which others can join only by Ear; the other, in which the service is performed in a plain way, and in which all the congregation nearly take an equal part. It has been argued, that nothing beyond this ought to be permitted in ordinary parochial service; it being *that* which general usage at the present day alone permits. But that carries the dis-

* See the Common Service of those Churches.—*The agreement of the Lutheran Churches with the Church of England* was set forth in a Tract *under that title* in 1715. In which it is said, "It might indeed have been shewn further; the agreement of the "*Lutheran* Churches with ours, in the manner of celebrating "the public worship,—that they agree with us in using a Liturgy, "in singing of Anthems, &c. But it is not necessary." p. 10.

The above tract appears to have been written to obviate any public prejudice against the Illustrious House of *Hanover*, on account of King *George* the 1st being a *Lutheran*.

HUTCHINS v. DENZILOE and LOVELAND.

9th *Feb.* 1792.

distinction further than the law will support—for, if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a Parish Church or Chapel.

The first Liturgy was established in the time of *Edward* VI., in 1548. This was followed, after a lapse of four years, by a second, which was published in the reign of the same king, in 1552; and the third, which is in use at present, agreeing in substance with the former, as ordained and promulged 1 *Eliz.* in 1559.

It is observable that these statutes of *Edward* VI., which continue in force, describe even-service as even-song. This is adopted into the statute of the first of *Elizabeth*. The Liturgy also of *Edward* VI. describes *the singing or saying of even-song*; and in the communion service, the Minister is directed *to sing* one or more of the sentences at the Offertory. The same with regard to the Litany;—*that* is appointed to be *sung*. In the present Liturgy, the Psalter is printed with directions that it should *be said or sung*, without any distinction of Parish Churches, or others; and the Rubric also describes the Apostles Creed "*to be sung or said by the* "*Minister and people*," not by the Prebendaries, Canons, and a band of regular choristers, as in Cathedrals; but plainly referring to the service of a Parish Church. Again, in the Burial Service:—part is *to be sung by the Minister and people;* so also in the *Athanasian* and *Nicene* Creeds.

The Injunctions, that were published in 1559 by

 Queen

HUTCHINS v. DENZILOE and LOVELAND.

9th *Feb.* 1792.

Queen *Elizabeth* completely sanction "the "continuance of singing in the Church,"* distinguishing between the music adapted for cathedral and collegiate Churches, and parochial Churches; also in the Articles, for the administration of Prayer and Sacraments set forth, in the further Injunctions of the same Queen, in 1564, the Common Prayer is directed "to be *said or* "*sung* decently and distinctly, in such place as "the Ordinary shall think meet, for the largeness "and straitness of the Church and Choir, so that "the people may be most edified †." If, then, chanting

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* "For the encouragement of the art, and the continuance "of the use of singing in the Church of *England*, it is enjoined, "That because in divers Collegiate, as also in some Parish "Churches, heretofore there hath been Livings appointed for "the maintenance of men and children for singing in the Church, "by means whereof the laudable exercise of music hath been "had in estimation, and preserved in knowledge: The Queen's "Majesty, neither meaning in anywise the decay of any thing "that might conveniently tend to the use and continuance of the "said science, neither to have the same so abused in any part of "the Church, that thereby the Common Prayer should be the "worse understood by the hearers, willeth and commandeth, "that, first, no alterations be made of such assignments of "Livings, as hath heretofore been appointed to the use of singing "or music in the Church; but that the same so remain; and "that there be a modest and distinct song, so used in all parts "of the Common Prayers in the Church, that the same may be "as plainly understood as if it were without singing; and yet "nevertheless, for the comfort of such as delight in music, it "may be permitted, that in the beginning or in the end of "Common Prayer, either at morning or evening, there may be "sung an hymn, or such like song to the praise of Almighty "God, in the best melody and music that may be conveniently "devised, having respect that the sentence of the hymn may be "understood and perceived." Vid. also Reformatio Legum Eccl. p. 85. s. 5.

† s. 1.

HUTCHINS v. DENZILOE and LOVELAND.

9th Feb. 1792.

chanting was unlawful any where but in Cathedrals and Colleges, these canons are strangely worded, and are of disputable meaning.—But in order to shew they are not liable to such imputation, I shall justify my interpretation of them by a quotation from the "*Reformatio Legum,*"—a work of great authority in determining the *practice* of those times, whatever may be its correctness in matter of law.—With respect to Parish Churches *in cities*, it is there observed, "eadem parochiarum "in urbibus constitutarum erit omnis ratio, festis "et dominicis diebus, quæ prius collegiis et cathe-"dralibus ecclesiis (ut vocant) attributa fuit *." The metrical version of the Psalms was then not existing, the first publication not taking place till 1562, and it was not regularly annexed to the book of Common Prayer till 1576, after which those Psalms soon became the great favorites of the common people †. The introduction of this version made the ancient hymns disrelished; but it cannot be meant that they were entirely superseded; for, under the statutes of the Reformation, and the usage explanatory of them, it is recommended, that the

* c. 6. This work was published in its present form, chiefly under the direction of *Walter Haddon*, LLD. Master of the Requests, Judge of the Prerogative Court of *Canterbury*, and Master of *Trinity Hall, Cambridge*.

† "Plain song was retained in most Parish Churches for the "daily psalms; so in the Queen's own Chapels, and in the choir "of all Cathedrals and some Colleges, the hymns were sung "after a more melodious manner, with organs commonly, and "sometimes with other musical instruments, as the solemnity "required. No mention of singing *David's* psalms in metre, "though afterwards they first thrust out the hymns, and by degrees also did they the *Te Deum, Magnificat*, and the *Nunc* "*dimittis*."—*Heylin* on the Reformation, p. 289.

HUTCHINS v. DENZILOE and LOVELAND.

9th Feb. 1792.

ancient hymns should be used in the Liturgy, or rather that they should be preferred to any others: though certainly to perform them by a select band with complex music, very inartificially applied, as in many of the Churches in the country, is a practice not more reconcileable to good taste than to edification.—But to sing with plain congregational music is a practice fully authorized, particularly with respect to the concluding part of different portions of the service.

If it be urged that there is any incongruity in this, I answer, that I have to discuss a question of illegality, not of incongruity. It is true, indeed, that what is obsolete is liable to the objection of novelty, and, likewise, that it has been tried and laid aside. The Court would not therefore advise the Minister to introduce what may be liable to such remarks, against the inclination of the Parishioners, and the approbation of the Bishop. But this is matter of expediency and discretion, which the Court must leave to the consideration of others. Having thus declared that the Churchwardens are not entitled to interfere, and that the practice is legal, it may be expected I should admit these articles. I am certainly authorized to do so; but I shall suspend their admission till the first day of next term, recommending an accommodation to the parties, and only intimating that the general sense of the Parish, properly obtained, will weigh very much with the Court in the further consideration of this subject. *

* The articles were admitted as reformed: when the Proctor for the Promoter declared he would proceed no further: upon which the Judge dismissed the other party, but gave no costs.

The Office of the Judge promoted by
HUTCHINS *v.* DENZILOE.

14th *May* 1792.

Proceedings, under stat. 5, 6 *Edw.* 6. ch. 4. s. 1. must be supported by *two* witnesses on the specific charge.—Dismissed.

THIS was a criminal proceeding against one of the same Churchwardens for "*quarrelling, chiding*, or *brawling*, under the stat. 5 & 6 Edw. 6. c. 4. s. 1." *

JUDGMENT.

Sir *William Scott.*—This is a proceeding on the statute of *Edward* VI., an Act certainly made on the exigency of the times at the Reformation, when there prevailed great heats and animosities on religion; which were likely enough to break out in Churches. The Act did not create the offence, as it subsisted by the common law before the statute was enacted; and there is no doubt that the Ecclesiastical Court had a right to interfere, to correct or punish any act of disturbance of the public worship. A party may now proceed either upon the statute, or upon the ancient law; for wherever the statute leaves an offence as it found it, and only introduces additional punishment, a party may proceed on either †. This proceeding is

* "If any person shall by words only, quarrel, chide or brawl "in any Church or church-yard; it shall be lawful unto the Ordi- "nary of the place, where the same shall be done and proved by "*two* lawful witnesses, to suspend every person so offending; "if he be a layman, from the entrance of the Church, and if he "be a clerk, from the ministration of his office, for so long a "time as the said Ordinary shall think meet, according to the "fault." 5 & 6 *Edw.* 6. c. 4. s. 1.

† *Wenmouth* v *Collins*, Lord *Raymond*, p. 850.

HUTCHINS v. DENZILOE.

14th *May* 1792.

is upon the statute, the construction of which has been extended beyond the original purpose, and is now applied to suppress any violation of public decorum, arising from other motives than religious differences. The Church is not the place where private quarrels are to be carried on, and it is no justification that there was misconduct on the other side, which might give the first provocation. The Court cannot consider this as a set-off between the parties; for the misbehaviour of one will not authorize the same acts in another, — the Church not being a place, where human infirmity can be pleaded to justify violent and indecent conduct however produced.

The statute admits a discretion in the Ordinary as to the punishment. By the ancient ecclesiastical law, he might impose censures, and might admonish; or, in case a Minister was the offending party, he might even sequester his benefice. The statute requires, that the offence shall be proved by two lawful witnesses; but by the ancient ecclesiastical law, I conceive, one witness to the fact, and one to the circumstances was sufficient, and would be so still in a proceeding in that form, according to the ordinary rule of the ecclesiastical law, which satisfies its own demand of two witnesses, by receiving one to the fact, and one to the circumstances. The statute requiring two witnesses, the Court might feel some delicacy about presuming to hold that such words of a statute would be satisfied in the same way.

Three charges are contained in the articles; and the Court may here observe, that it is always laid, as a matter of form, that the subject of them *gave scandal;* but these are merely words of form, for, if

if the words are of such a nature as to give scandal, the proof of impression on other persons around is of no consequence. The only question is, whether they amount to an offence under the statute? The immediate interpretation of the statute, in its application, belongs to the Ecclesiastical Court; and if one witness is only adduced to one charge, so that the articles stand on this proof alone, this Court will not take upon itself to say that the statutable demand is satisfied.

The witness says, "he several times heard "*Denziloe* call Mr. *Hutchins* a troublesome fellow, "and that he would do every thing to make his "situation uncomfortable." This occurred in the Vestry-room, and will come within the mildest interpretation of the statute, and would be sufficient to call upon the Court, to exercise its authority for the protection of the Clergyman. It is further deposed, "that the words were said in an angry tone." This circumstance is always of consequence; but here it is not wanted, as no doubt this is the very offence which the statute was meant to prevent, though, standing only on the evidence of one witness, the Court is not authorized to notice it. The same witness speaks to the second charge: "That on 21st *August*, "1791, immediately after service, he came to the "christening pew, and addressed himself to the "sponsors in these terms: 'Has that man charged "one shilling for registering? if he has, he has "imposed upon you, and pocketed it, and ought "to be publicly called to account for it.'" Now when I consider all the circumstances, I must think it as just a subject of prosecution as ever came before the Court. A Churchwarden, whose duty it is

HUTCHINS *v.* DENZILOE.

14th *May* 1792.

to prevent all indecency, comes, at the celebration of one of the sacraments, and makes a violent charge against the Minister, thereby disturbing not only the persons present, but the performance of the divine office itself: Surely such behaviour is strictly within the statute, and must produce all the mischief which the statute was intended to prevent. If the suit had been brought on the ancient law, where the Court was not restrained in its punishment, and the offence was legally proved against the party; It would have used its utmost power to suppress such indecency, and may trust that It would be supported by the approbation of all serious persons. It would teach this person that a Minister of the Established Church is fully protected by law, particularly in the celebration of divine worship. But, as this article also is proved by one witness only, the Court feels a difficulty in pronouncing that fact to be *legally* proved, in a proceeding upon the statute.

On the third article there is no doubt that, if the witnesses speak with sufficient precision to the fact, the Churchwarden must be convicted;—the only question is as to the effect of the evidence. The first witness says, "that *Denziloe* charged "*Hutchins*, in an angry manner, with tearing the "leaves out of the book—with having taken more "for his fee at christenings than he is entitled to; "and threatened to cite him to the Ecclesiastical "Court." These circumstances are also spoken to by *Purney* (the second witness) who adds, that he said also, "he would prosecute him as far as he "could." With respect to cases of *chiding*, *quarrelling*, or *brawling*, there is a discretion in the Court, which would induce it to consider the time and

and place: *that* may be "*chiding* or *brawling*" in the Church, which would not be so in the vestry. The vestry is a place for parish business, and the Court would not interpose farther than might be necessary for the preservation of due order and decorum.

The express words used are not sworn to: the witness only says "that he charged him," a way of deposing that does not clearly shew they were words of reproach; and the rule, in criminal matters, inclines to take words "*in mitiori sensu.*" These are not so brought before the Court, as to oblige it to consider them as invective: it is said that they were spoken in an angry manner,—but unless they are so proved, the tone alone is not a circumstance sufficient to satisfy the Court that they were words of contumely. I think therefore they do not amount to the legal offence; and that the Churchwarden saying "the Clergyman had "taken more than he ought, and that he would "seek redress in the Ecclesiastical Courts," though in the manner in which that charge is proved here, is not enough to convict him of the offence laid in these articles. I cannot then pronounce the censure as prayed,—but feeling a suspicion that the Churchwarden has acted improperly, and that, if the fact had been legally proved, I should have punished him as severely as the law would have allowed, I content myself with simply dismissing him, though I doubt the propriety of the lenity with which I treat him.

PRITCHARD *v.* DALBY.

3d *Feb.* 1792.
Misnomer—how considered.—Averment of the party, as to his true name, required, and binding on him.

THIS was a question of practice, as to the effect of a misnomer, and the effect of the averment of the party, as to his *true name.*

In this case, a citation had issued against *Sarah Dalby*, in a suit of Defamation, on which an appearance was given under protest, alleging her true name to be *Dolby.* The usual assignation was made, that the objection should be argued, on petition of both Proctors, the following Court. But, on the next Court-day, after the cause had been further continued, during the sitting of the Court, the Proctor for Mrs. *Dalby* alleged the name of the person cited to be *Sarah Austin*, and prayed to be dismissed. In reply to this averment, it was argued, that on an objection of misnomer, the party must plead the true name, and will be held by that allegation; and cases were cited, in which that rule had been held strictly at common law *. On the other side it was said, that the Court would relieve the party from the mistake of his Proctor, in any stage of the proceedings, and that she was at liberty to vary the protest, till it came before the Court for decision, as the party could only be bound by actual appearance.

* *The Queen* v. *Stedman*, 2d Lord *Raymond*, p. 1307.

JUDG-

PRITCHARD *v.* DALBY.

3d *Feb.* 1792.

JUDGMENT.

Sir *William Scott.*—In my opinion this protest cannot be sustained. It is within the recollection of the Court, that, on the first allegation of misnomer, It had intimated that it was not a material variation, but apparently the same name; It however allowed the objection to be argued on petition. It is now alleged that the true name is *Sarah Austin;* but whoever alleges a misnomer is bound to assign the true name by which he means to abide, and against which he shall not be at liberty to aver, for, without such a limitation, the other party might be carried on for ever.

When a person appears, it may morally justify the presumption that he is the party intended; the law, however, allows the benefit of the exception, as to the validity of the citation, but under the condition before mentioned. The material question is, how the mistake originated: Upon that question, the Court must presume that the Proctor would not make that averment without authority; it must therefore be considered to be the act of the party. It may be true, that a Proctor may introduce new matter on his protest, but not such as is inconsistent with a former allegation. I think, therefore, that the attempt, which has been made to delay these proceedings, on this last objection, is improper, and that the protest must be over-ruled.

Groves and Wright *v.* the Rector, Parishioners, and Inhabitants of Hornsey, &c. &c.

19th *June* 1793.

Faculty for erecting a gallery, for the accommodation of the increased population of the Parish, granted.—Objections, on the part of certain Parishioners, over-ruled.

THIS was a proceeding in objection to an application for a Faculty to erect a gallery in the Parish Church of *Hornsey*.

Judgment.

Sir *William Scott.*—This is an application for a Faculty to erect a gallery in the Church of *Hornsey*, in the County of *Middlesex*. The citation, calling upon all persons to shew cause against the grant, was returned nearly three years ago; and the Court would feel a painful responsibility, if this delay arose from the proceedings of the Court itself; but it is relieved from that apprehension, by the explanation given, that the proceedings had been suspended, in consequence of overtures of accommodation. The libel recites the increase of Parishioners, and that there is not room to accommodate them; that at a Vestry on the 29th *August* 1790, a Committee was appointed to inspect the Church, and consider the measure; that a second Vestry was held, after due notice, on the 16th *September* to receive the Report, which was then considered and approved. It was resolved that a gallery should be erected, and the Churchwardens were authorized to apply for a plan and estimate of the expence. An appearance has been given

19th *June* 1793.

given to this citation for *Toft* and five others; but the allegation is in the name of twenty Parishioners.

The first article pleads "that the Church is ancient; that there are seats on the floor for 300 persons, and that in the present gallery there is room for 150; that the pews are unappropriated, except three; that more than two thirds of the Parishioners live at *Highgate*, and resort to a Chapel there, and that the Church is sufficient for the remainder." It is then pleaded, "that the resolution of Vestry, for an application for a gallery, had passed without the knowledge of a greater part of the Inhabitants; and that, at a subsequent Vestry, it was annulled by a majority of six to one. Notice was then left with the Churchwardens not to apply for the gallery." The subsequent articles plead, "that the Church is old, and would not bear an additional gallery; that it would obstruct the light to the pews underneath; and that a great majority of the inhabitants disapprove of it."

This last averment is most material, and is one to which the Ecclesiastical Court pays great attention, though it certainly is not the only circumstance to be considered; for the majority may incline to unnecessary expence, against which the Court ought to protect the minority, or it may object to necessary expence. The Court is not bound by this circumstance alone; It may refuse the whole Parish joined together, or may grant, if it appears necessary, a prayer, on the application of one against all the rest. But though the Court is not bound by the wish of the majority, It will pay great attention to it. The Parishioners

Groves and Wright v. The Rector, etc. of Hornsey, etc.

19th *June* 1793.

ioners are, in the first instance, the best judges of the inconvenience, and the remedies for that inconvenience; and the Court will not lightly presume that a majority would authorize or willingly incur an unnecessary expence.

The first point then to which the Court looks is, whether the disapprobation of the Parish, on which the objection is founded, is capable of being duly ascertained by the resolution of Vestry, or by the opinions or sentiments of others, who, being prevented from attending there, have joined in the proceedings in this cause? The number here, in either way, is about 26, in the Vestries and in the Proxies signed, which certainly is not a majority of the Parishioners; besides this, there is not one witness produced to support the averment of the allegation: I am under the necessity therefore of considering, that it is not shewn that the majority disapprove of the measure on their own plea.

What then is the nature of the responsive allegation, given in on the part of the Churchwardens? It states an increase of Inhabitants, and the insufficiency of the Church to supply those with pews who have applied for them; that a gallery would not endanger the fabric, or darken the present pews; that a regular notice was given of the Vestries, and it sets forth the orders and confirmation of them that passed: this appears to be the custom of the Parish; and highly proper it is to give the orders of Vestry a second consideration. It is said, that the order was not *confirmed* at the Vestry held in *January;* but it was not *annulled*, and it was confirmed afterwards at a third Vestry, when the Churchwardens were directed to use their endeavours to procure a Faculty, and to abide by the

Groves and Wright *v.* The Rector, etc. of Hornsey, etc.

19th *June* 1793.

the former resolutions. If, therefore, the facts are to be taken as stated, the sense of the majority must be presumed in favour of the measure, unless it can be shewn that the order and confirmation were unduly obtained.

Three objections have been stated; first, that the Parishioners were ignorant of the first Vestry, when a Committee was appointed to report upon the expediency of erecting a gallery. It is not, however, pleaded that there was no notice; and if it can be shewn that due notice was given, persons who do not choose to attend, are not to plead ignorance, even if the notice was general, and for *parochial purposes* only; but still more so, if particular, and the Vestry was called for this immediate object. According to the general rules of law, a Churchwarden cannot make a rate himself, but, if he gives notice of a Vestry for that purpose, and if no other Parishioner attends it, he *may* alone,—or where only two or three attend, they have the power of the Parish delegated to them on that occasion; and I think, in this instance, the notice is sufficiently proved. The next objection is, that the Committee was attended by others who did not belong to it. It appears that nine persons attended, but that of this number five were Parish Officers, who, by custom, which is extremely proper, are standing members of all Committees. However, other persons attended, and if it appeared that they controuled the proceedings by a fair majority, it would vitiate the present application; but it is proved, that the resolution for a gallery was unanimous, and therefore a thin attendance was of no consequence. The third objection is, that on the 16th *January*, in a Vestry held

GROVES and WRIGHT v. The RECTOR, etc. of HORNSEY, etc.

19th *June* 1793.

held on that day, the whole order was rescinded, but all that appears from the exhibit of what passed there is, that the minutes of a former Vestry, of the 26th *December*, were read and confirmed. Those minutes contained the opinion of the Surveyors, that the proposed additions would not injure the fabric, and also the order for the plan and estimate. But little is to be inferred from an order rescinding these minutes, when no notice is taken of all the former orders, which should have been rescinded by a resolution *then* passed, and then that rescinding order should, conformably to their practice, have been confirmed by a subsequent meeting. On the 9th *March* another Vestry is convened with particular notice, in order to receive the report, and on *other parochial business*. It might be a question, whether this notice was sufficiently full under all the preceding circumstances? and if the former resolutions had rescinded all the former orders, I doubt if this would have been sufficient; but others were then subsisting. It is not objected that this meeting was not duly called, nor is any irregularity alleged against the confirmation of the order on this occasion.

After the admission of the allegation, the Churchwardens gave notice of another Vestry; this was held on the 21st *July* 1791, and was confirmed on the 27th, when the resolution for the Churchwardens to continue the application was carried by a majority of 41 to 22. Then the Court is to presume the strength of all parties was collected, and the result was a decision, of nearly double the number, in favour of the present petition. I am then bound to take the fact, as incontestably proved, that a majority of the Parish-

Parishioners is in favour of the measure; nor is this inference impeached by saying, that it was an approbation obtained by personal canvass, and that one of those, who formed the majority, was active in the procurement of it, since, in all public business, some one individual must take the lead. If, indeed, he does it corruptly, if he intimidates or bribes his fellow-parishioners, that may impeach a measure which has been effected by such means: but if he obtains a majority fairly by interference, the degree of activity and zeal that might have been used for that purpose, will not affect the validity of the measure. The mode of agency here was free and unexceptionable; and even should the numbers have been obtained by personal application, they yet must be taken as a majority not improperly obtained. It being then proved that a majority was in favor of this application, it must be a strong case to induce the Court to over-rule their decision. One or other of these circumstances must be clearly made out, either that a gallery was unnecessary, or that it was highly inexpedient. That some enlargement of the Church is not unnecessary, is very clear. In a village near this town, every one knows the increase of population. The Church, which is of great antiquity, never monastic, but a mere Parochial Church, constructed for the then state of population, which has one gallery only, and that very ancient, half occupied by a school, and the other half by cottagers and inferior people, cannot be supposed to serve the parish in the present state of its inhabitants.

GROVES and WRIGHT v. The RECTOR, etc. of HORNSEY, etc.

10th June 1793.

On this general statement little evidence would satisfy the Court, that the Church is inadequate

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GROVES and WRIGHT *v.* The RECTOR, etc. of HORNSEY, etc.

19th *June* 1793.

to the due accommodation of the Parishioners, and that it would be highly proper that it should be enlarged. It is distinctly proved that new houses have been built, and that several families are prevented from going to the Parish Church by want of seats, while others are obliged to go to neighbouring Churches; that repeated applications have been made to the Churchwardens for pews, that the Church is not capable of holding more than 200 persons, and that there are 70 or 80 families, which, on the lowest calculation, will be too many for the present capacity of the building.

These then are inconveniences against which the parish is bound, and may be compelled by Ecclesiastical Censures, to provide; for every man, who settles as a Householder, has a right to call on the parish for a convenient seat. The inference, indeed, is almost admitted by the Objectors, and on their own shewing, that the Church is insufficient, — for, how do they attempt to prove the contrary? First, that several persons omit coming to church. I am sorry for it; but it is impossible to sanction an objection to a reasonable increase of the accommodation of the Church, on the supposition that any of the Parishioners neglect their duty. The Court must rather adopt the supposition that they are desirous of doing their duty, and of availing themselves of their right to be accommodated. Secondly, it is suggested, that the Churchwardens might put different families into the same pew, as the pews are not appropriated by any Faculty from the Ordinary. But they do not say, that they are not so by *custom;* or by some other title, which the Court would respect till it was disputed in a regular and proper

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manner. They may be appropriated by prescription, or by a possessory right on the allotment of Churchwardens:—Now, a prescriptive title cannot be altered by any authority, nor a possessory title by the Churchwarden alone, though it may be by the Ordinary. But good ground must be shewn before the Court would exercise such an authority. It is said, that these pews would afford more sittings, and that they are sufficient for eight persons. On my own view, I think *not*, without inconvenience to the occupiers; and, if *they were*, I cannot say that there is any thing so extravagant in the proposed addition, as for the Court to overrule such a resolution, and to put individuals of different families in the same pews, which may produce contention and inconvenience.

GROVES and WRIGHT *v.* The RECTOR, etc. of HORNSEY, etc.

19th *June* 1793.

I think, then, it is clearly shewn that some addition is necessary, and the only question is, whether the proposed method is expedient? It certainly is not sufficient to say that others might be more so; and though other plans are mentioned, there is no evidence to shew that they are better, than the one proposed to the notice of the Court. I shall express no opinion which might be the most expedient, as the Faculty can regularly be only for the plan proposed; and it is no objection to *that*, that other means might be devised, if they have not been regularly brought forward.

Two grounds of opposition to a gallery have been stated; — danger to the fabric, and that it would darken the pews. It is not said that the expence would burthen the parish, which is often pleaded, nor that the symmetry and proportions of the Church would be violated, which the Ecclesiastical Court would be careful to preserve. With

Groves and Wright v. The Rector, etc. of Hornsey, etc

19th June 1793.

respect to the first objection, the Church is of considerable antiquity, and apparently not of firm architecture; but I see no reason to suppose that a gallery of light fabric might not be constructed without danger. Two Surveyors say it would be safe; one speaks otherwise, but with this reserve, that, without other walls, it would endanger the Church. It does not appear that it must necessarily be so constructed, and the Court is not to suppose that the parish would employ improper persons to spend their money, especially when the approbation of the proposed plan is manifest by a majority of two against one.

The second objection is not material; for it appears to the Court, that the Church is competently lighted, and that it is capable of receiving additional light from the form and glazing of the windows. The Surveyors have no doubt upon this point, and some of the Parishioners are of the same opinion. Some, that are seated under this proposed gallery, join in this application, and others are ready to exchange their pews for these. I do not then think that I am warranted to say, that it will either weaken or darken the Church. On the whole, considering the evidence, I am bound to conclude, that the erecting a gallery is conformable to the wishes of the Parishioners, and that their opinions have been fairly obtained; and thinking some addition is necessary, and no other method being proposed, of which I can judicially take notice, I am of opinion that this Faculty ought to be granted.

The only question is as to costs; and I am first to consider, that the Churchwardens have a claim upon the Court for its support, in the expenditure of money in the way directed by the parish,

and finally confirmed by the Court; and also, that the conduct of the persons opposing them is open to this observation, that their resistance was not withdrawn when it ought to have been, namely, when the parish made its final determination on the 27th *July* 1791; and the whole transaction has been such as the Court would not wish to see.

GROVES and WRIGHT *v.* The RECTOR, etc. of HORNSEY, etc.

10th *June* 1793.

The witnesses are all of one family, except the Surveyor, which may justify a suspicion that the opposition originates less in the wishes or opinions of the Parish, than of one or two families in it; and, as the family, from which the opposition principally comes, is well accommodated in the Church, an acquiescence in the general wish of the Parishioners might reasonably have been expected. I think, therefore, that I should be warranted to give costs from the time of the final approbation of the Parishioners; but there are other reasons which incline the Court to withhold them; first, it appears, that there has been difference of opinion in the Parish, though the majority is in favour of the gallery, and I am not willing to pronounce, what the sentence of the Court would seem to imply, that the opposition was not on public grounds. Secondly, costs are in the discretion of the Court, and not matter of strict law. One great object of the Court in Parish contests, is to quiet them as soon as may be, and the Court indulges the hope, that moderation on its part in not condemning the objecting parties in costs, may teach them moderation in their future intercourse with their neighbours and fellow-parishioners; and, on these grounds, I think I shall best consult the interests of the Parish, by decreeing the Faculty, but not condemning the opposers in costs.

THE CHURCHWARDENS OF SAINT JOHN'S, MARGATE, AGAINST THE PARISHIONERS, VICAR, AND INHABITANTS OF THE SAME

14

Faculty for accepting and erecting an Organ, offered to the Parish Church of *St John's, Margate*,—granted, without clause against future expences being charged to the Parish.—Objection, on the part of certain Parishioners, over-ruled

THIS was a case before Sir *William Scott*, as Official to the Archdeacon of *Canterbury*, ... an application for a Faculty for accepting and erecting an Organ.

JUDGMENT.

Sir *William Scott*.—This is an application to the Court for the grant of a Faculty for erecting an Organ in the Parish Church of *Margate*; and it is brought in the Court of the Archdeacon of *Canterbury*, who, by ancient composition with the Archbishop, exercises episcopal jurisdiction in a great part of that Diocese.

It originated in a Citation with an intimation, and an objection is made, that the size of the Organ is not specified, which is usual and convenient; since the size may be a material ground of objection. But I think it is not a fatal objection, since the Parish must take the Faculty, if it is granted, as applying to a proper and convenient Organ only, and though the intimation is liable on this ground to objection, it may be cured in the way that has been mentioned.

The law respecting Church Ornaments is now generally understood and settled. The consent of the Parishioners is not indispensably necessary,

unless

unless to charge the Parish with any expence for the support of the ornament after it has been put up. But if there is no such charge incurred, the approbation of the majority of the Parishioners is not necessary, nor the disapprobation binding on the Ordinary.*

The Church-wardens of St John's, Margate, v. The Parishioners, etc of the same.

3d Nov. 1794.

Then if all objection on ground of expence is removed, the Ordinary is not restrained by any want of consent on the part of the Parish, which is only requisite when it is put to expence for things not necessary, but merely ornamental. It may be difficult indeed in some cases to distinguish, whether an addition of this kind to the service of the Church, is to be deemed necessary or ornamental; because Organs in some Churches may be necessary, though in others only ornamental. In Cathedral Churches they would, I conceive, be deemed necessary, and the Ordinary might compel the Dean and Chapter to erect an Organ, as proper and necessary for the service usually performed in such places. In Parish Churches it would be otherwise; and though I do not concur in the observation, that *Organs in such places are to be generally discouraged*; it might be proper to do so in some cases, and it would depend on the circumstances of the Parish, what judgment the Court would form on the particular case. In the present case it appears by the application, that the offer of an Organ has been made by a Parishioner, so that no expence will be incurred in the first instance.

* *Butterworth* and *Barker* v. *Walker* and *Waterhouse*, 3 *Burr* Rep. p. 1689.

The CHURCH-WARDENS of ST JOHN'S, MARGATE, v. The PARISHIONERS, etc. of the same.

3d Nov 1794.

It is said that a proper Organ will cost more than the sum proposed to be given; but I understand the proposal as not limited to any precise sum, but as the offer of a proper Organ. There may, however, be the expences arising out of it, as for erecting and keeping in order, and for an Organist; and as these may fall on the Parish, it may render the consent of the Parishioners necessary. On the effect of consent I am disposed to hold the majority of the Parish binding on such a question as this, though it might not bind in all cases, as if an Organ was to be voted without the authority of the Ordinary. In all cases where the Parish is competent to act by its own power, it is the majority which must bind; and the majority of a Vestry, in cases fit to be there decided, will bind the minority of the Parish, though it will not bind the Ordinary, in matters subject to his discretion. And if He sees that many of the Parishioners object, though they may be the minority, it may be very proper, that He should not be totally inattentive to their opinion. It is usual therefore, in cases of mere ornament, to tender affidavits shewing what the majority in Vestry was, in order that the Court may ascertain what may fairly be considered the predominant wish of the Parish. In cases of this kind, the intimation goes out to all persons, and therefore every one not appearing must be regarded as consenting, by virtue of this notice, and also of the representative character of the Churchwardens who apply for this Faculty.

The balance of number in favour of this application are 213 to 42, about five to one; and though it is said by the opposers that they could have

The Churchwardens of St John's, Margate, v. The Parishioners, etc of the same

3d Nov 1794

have brought more, but that they chose to stand on the merits; I must suppose they have brought all they could, as the merits on the present enquiry depend, in no small degree, on the numbers. In interest, it appears that the rental of the Parish is about £12,000; of which a proportion of £4,494 is for the Organ, and £3,353 against it. On this representation it is to be observed, that the whole interest is not brought forward; but it is reasonable to presume that all, who do not come forward on the call of the intimation, agree to the measure. There is then the legal consent of the Vestry, and a sufficient *constat* to satisfy the Court, of the sentiments of the real majority of the Parish, in favour of the application.

The consent, however, is not the only thing that is material, since the measure may be improper, in consideration of the Parish or of the Church, or private rights may be affected. It might be the duty of the Ordinary, therefore, under particular circumstances, to interpose, and protect the Parish from its own indiscretion, if any inconvenience was to be apprehended from it; as if the Parish was small, and the rent of houses very high, or there were other circumstances, that rendered such an addition to the Church inexpedient. Attending to such considerations, the Courts have usually adopted the rule of inserting a clause, that no expence shall fall on the Parish; but this rule is discretionary only, and though generally proper, by no means binding.

In *London*, where Parishes are small, and the rents high, an Organ might be a considerable burthen, and therefore the rule is often adopted, though

The Churchwardens of St. John's, Margate, v. The Parishioners, etc. of the same.

2d Nov. 1794.

though seldom well observed in practice; since the course pursued is, that several persons certify, that they are willing to subscribe to provide a settled fund, for the maintenance of the Organist, though no permanent endowment is arranged; a fund for the present being all that is usually required. That there should be a settled fund is not prescribed by any rule of law, which is to be found in books, or in practice, except in particular cases in which the Ordinary may think it necessary. If the circumstances of the Parish are different, where the Parish is large, and the Inhabitants are opulent, and desirous of such an instrument, is it unfit or beyond the discretion of the Court to sanction such a grant to them? A Faculty does not enjoin the raising of any rate; and if it is found a burthen, it may be removed by another Faculty.

Is it necessary then that such a clause should be inserted, either on principle or settled usage? I have already said that I know of no principle that can make such a rule obligatory in all cases; and as to usage, the cases, which have been cited by the Counsel, relate chiefly to small Parishes, in which the Ordinary would be unwilling to bind the Inhabitants without in a very general consent. A case of real authority, as a negative, would be shewn, *if* the Court had said,—It would not grant without such clause, and the Parish had refused to accept it on those terms. That would be a case in *foro contentioso*, whereas all the precedents cited have been of cases, in which the parties have been willing to receive. I have seen grants of two or three Faculties, in the Consistory of *London*, on the application of some of the Parish, without

any

any provision for an Organist: as for *Fulham*, in 1732; *St. Mathew, Friday Street*, in 1734.

It is said, that this should be done only when the Parish are unanimous. The rule of unanimity may be proper in some cases, and not in others; and it is rather an argument against the effect of unanimity, that the vote includes posterity also. In the case of *St. Stephen's, Walbrook*, where the Inhabitants were unanimous, the clause was erted. All precedents prove only, that in s the Court has thought proper to insert such a clause, but not that it is bound to do so, by any rule of law with which I am acquainted. If it is a rule of discretion only, what are the circumstances in this case? Here is a populous Parish, of great public resort, with a rental of £12,000, and with Inhabitants in easy circumstances. The expence on resident Inhabitants, will be little more than one halfpenny in the pound. If such a Parish is willing to have the power to tax themselves, and the Court should refuse, it would amount almost to a declaration that no Parish ought to have an Organ.

But it is to be considered also, whether any private right will be affected by it. All that I find on that point is, that one person makes an affidavit, that three pews, belonging to himself and two other persons, will receive much detriment; but in what manner is not stated. It appears that his pew was erected by himself without a Faculty;—there is, therefore, no prescriptive right. It appears, that it was not built by leave of the Parishioners, and although the Churchwardens have the general right, usage in some places gives it to the Parish in

The CHURCHWARDENS of St JOHN'S, MARGATE, v The PARISHIONERS, etc. of the same

3d Nov. 1794.

in Vestry; and on the affidavits that have been exhibited, I think it is so here. This private right therefore, which is claimed, is founded on no legal ground, nor is it good against the Churchwardens or the Parish.

Considering all the circumstances of this case, I am of opinion, that the Court has authority to grant the Faculty, and that there is no such general rule, requiring the unanimous consent of the Parish to obtain the Faculty without the clause mentioned: there is a decided majority in favour of the application, and they have acted on a reasonable and prudent confidence.

It is highly proper that there should be an Organ in this Church, if in any; and I pronounce for the grant, without inserting any clause respecting the provision for the Organist, or for exonerating the Parish from the expences that may be incurred in maintaining it.

THE OFFICE OF THE JUDGE PROMOTED BY

MAIDMAN *v.* MALPAS.

15th *Dec* 1794.

Proceedings promoted by the Rector of the Parish, against a person, for erecting a Monument in the Church without a Faculty.—Sustained.

THIS was a cause of Office, or criminal proceeding, promoted by the Rev. Mr. *Maidman*, Rector of *Greenford*, against the defendant, for erecting a Monument in the Chancel of the Church of *Greenford*, without a Faculty. The party appeared under protest, alleging, that he had already been cited for the same cause and dismissed, and that he was not therefore liable to be proceeded against a second time;—that there was the further irregularity in these proceedings, that he was cited, *in the name of the Bishop*, to answer to articles to be exhibited against him by his Officer; whereas the Citation should have been in *the name of the Judge*.

In support of the Protest it was contended, that the Defendant was entitled to be dismissed for the reasons alleged in the Protest, that he had been dismissed on a former Citation; that the Citation was irregular in form; that the Promoter had been privy to the act complained of, and that the Monument had been taken down; that the party had been in error as to the necessity for a Faculty, and it was obvious that the present proceeding had been instituted only to exact a fee of £30, which had been demanded; that if there had been any violation

MAIDMAN v. MALPAS.

15th Dec. 1794.

violation of public decency, or private right, the Court might not be at liberty to enquire into the motives of the Promoter, but there had been neither in this case, only a mere omission of form in not applying for a Faculty, which would undoubtedly have been granted; and it was hoped therefore, that the Court would not permit its authority to be used in the promotion of this suit.—On the other side it was said, that the Citation, *in the name of the Bishop*, calling upon the party "to "appear before our Vicar General and Official "Principal, and to answer to articles to be exhibited "*on our behalf* by virtue of our office," might be a style properly used in any case of articles to be exhibited by the Chancellor;—that the jurisdiction exercised by the Chancellor was in law the act of the Bishop;—and there was in fact no innovation in this form, though of late it had been deemed sufficient to describe the Office and the Promoter, without suggestion on whose behalf or in virtue of whose authority the suit was promoted. Various cases were cited,—of *Thompson* v. *Saunders*, in 1737, in the Peculiars, for erecting tombstones—of *Russell* v. *Musgrave*, in the Consistory in 1778;—and of *Hinde* v. *Martin* in the same Court; all litigated cases, in which there was no suggestion, on whose behalf the articles were to be exhibited. In *Lovegrove* v. *Mason*, 1749, they were in the name of the Bishop, as here; and in the ancient language of the Court, when the proceedings being in Latin, were more precise, the usual form was "ad respondendum articulis," without special suggestion as to the Office promoted.—That in 1717 there was a suit of Office on a Cita-

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MAIDMAN v. MALPAS. 15th Dec. 1791

tion in the *name of the Bishop*, and without *any behalf*, against two persons for having been present at a clandestine marriage; and in 1718, in the *Chislehurt* case *, for disturbance of Prayers against Laymen, the style was "*in the name of the Bishop of Rochester, ex officio nostro, ex promotione A. B.*"

These instances shew that there has been no substantial irregularity; and as for the former dismissal, it was by direction of the Court, for a reason which it intimated during the argument, without prejudice to the right of further proceeding. That the party was bound therefore to give an appearance; and if he then wished to put an end to the suit, on confession of the facts, the Promoter was desirous to shew, that he had no private motives, and was ready to take the judgment of the Court without further proceedings. That if the party had been precipitate in taking down the Monument, it was not by the consent of the Rector, since the answer which had been given to that application, was, "that he must be left to "do as he should be advised." That there was no demand for the gratuity, but a declaration only that the Rector expected what other Clergymen usually received: which was candidly acknowledged and not denied, though it was not made in the form of an absolute demand.

* Vide supra p. 174.

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MAIDMAN *v.* MALPAS.

15th *Dec.* 1794.

JUDGMENT.

Sir *William Scott.*—This is a proceeding in which the Office of the Judge has been promoted by the Rector of *Greenford* against the Defendant for the reasons set forth. There can be no question as to the jurisdiction of the Court, which is established by its own decisions, and those of the Temporal Courts, that no Monument can be erected without leave of the Ordinary. Parishioners have a right to be buried in the Church-yard, without leave of the Incumbent; but the permission of the Ordinary is necessary before any Monument can properly be erected. It is to his care that the fabric of the Church is committed, that it shall not be injured or deformed, by the caprice of individuals. The consent of the Incumbent is taken on such occasions; and especially of the Rector, for Monuments in the Chancel. A Faculty likewise is required, though it is frequently omitted, under the confidence reposed in the Minister, and the Ecclesiastical Court is not eager to interpose. But when cases are brought before it, it is necessary to enquire, whether the thing is proper to be done, and whether the consent of the Incumbent has been obtained.

Something has been said in argument of the extortion of money; but I am not prepared to say that the demand of a usual fee is to be called extortion. I conceive the Clergyman may legally demand and accept a fee for his consent; nor is it an improper thing, that the Ecclesiastical Court should see that it is done, and that all temporal interests are duly protected; as in other instances, in the putting

putting up of an organ, &c., temporal interests are always attended to. Maidman v. Malpas.

A former citation was taken out in this case, from which the party was dismissed in consequence of a rule which the Court had laid down *, and which had been intimated on former occasions, that the leave of the Court should be first obtained; since it is a part of the Ecclesiastical Jurisdiction, which is not to be exercised without discretion, or to be left entirely to the judgment or passions of private persons. That rule had been overlooked in extracting the former citation, and it was superseded on that account, but without prejudice to the cause. A new citation was then extracted, and an appearance is now given under protest, objecting to the irregularity of the proceedings, on the grounds which have been stated. 15th Dec. 1794.

It is first said, that it is against form, and against the principle of these proceedings, that the Office of the Bishop should be promoted, instead of that of the Judge. But I have directed the register of the Court to be examined, and find that there has been great variation in the form: as "*in the Name of the Bishop*," "of *our Office*;" in others "at *the Promotion of the Judge*;" in others, *neither*; mentioning only the offence, the place of appearance, and the name of the Promoter. But it has been

* In the case of the Duke of *Portland* v. Dr. *Bingham*, the Court had observed, that the rule was clear, that where the Office of the Judge is promoted by any private individual, a personal application should be made to the Judge, in the presence of the Registrar, to be taken down and appear in the minutes of the Court, and that It would in future hold any omission of that rule fatal.—In consideration of the circumstances in that case, It gave leave for the cause to proceed. 20th Mar. 1792.

MAIDMAN v. MALPAS. 15th Dec. 1794

been said, that if the proceeding was personally at the instance of the Bishop against a Layman, it would not be valid.

The Office of the Judge is not original, but derivative, and may fairly be styled the Office of the Bishop, for it is the Office of the Bishop exercised by his Judge—*Officialis Judex Episcopi.* It is conformable to former precedent, and not objectionable in principle, and the proceedings are not to be impeached on this ground. Then on what other ground is the party entitled to be dismissed, according to the prayer of his Petition. It is objected, that the history of the transaction shews that the suit would not have been commenced, if the Clergyman had not been dissatisfied with his fee, with an insinuation as to some sum of five pounds that had been paid, as is said, for the consent which was obtained. But the consent of the Rector alone is not sufficient. The Court has a right to animadvert on a party erecting a Monument without a Faculty; and when such an irregularity is brought to its notice, it is obliged to see, that all the requisites of law are rightly observed. The consent of the Rector alone cannot be alleged as a bar to the proceedings. The Court will not look too narrowly into the motives of public prosecutions, since there are few, perhaps, which are not, in some degree, influenced by some private considerations. But I see nothing improper in an application being made to the Ecclesiastical Court by the Clergyman, in this form, if his right is denied.

It is less material, however, to look to the motives of the parties than to the facts; for, be the former what they may, they will not, I think,

be sufficient to procure a dismissal. It appears that a corpse was buried in a vault in the Chancel, under a Faculty, as may be presumed, or a prescriptive right which supposes it, and that five guineas were paid to the Rector, — a liberal fee, but not, as I conceive, intended to be given for leave to erect a monument. It is said, "that consent was given;" but it is answered, "not without condition;" intimating the expectation of a fee. The monument was then erected, without application to the Court. After some time, the Clergyman observed, that his fee had not been paid, and though no regular demand was made, it was intimated that a fee of £30 was usually paid to the neighbouring Clergyman on similar occasions. It is to be lamented, that all this was not made matter of friendly discussion. But as the case has come before the Court, It would not act properly towards Rectors or Impropriators, lay or ecclesiastical, if It was to say, that any person might erect a monument without their leave; which would be the effect of these proceedings, if I was to dismiss the party under this protest.

The course which the Clergyman adopts to do himself justice is, by promoting this suit in the Ecclesiastical Court, for erecting the monument without a Faculty; and I see no impropriety in such proceedings. It is alleged, that the party offered to procure a Faculty, or to take down the monument; but a Faculty would not have been granted, as a matter of course, without proof that the leave of the Rector had been obtained. It is also said, that the Clergyman ought to have informed the party that a Faculty was necessary; but every one is bound to know the law, so far as is requisite for

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MAIDMAN *v.* MALPAS.

15th *Dec.* 1794.

the proper guidance of his own conduct. Then it is alleged that the Rector had given his consent that the monument should be taken down, which, however, is denied. But the taking down the monument would be an offence, for which also the party would be liable to prosecution; since, when once erected, it cannot be removed without the sanction of the Ordinary. The consent of the Rector, therefore, would not be sufficient.

On the whole matter of this Protest, I am of opinion, that it is not sufficient to excuse the party from giving an absolute appearance. At the same time, as it is intimated that it is not the wish of the Promoter that the suit should proceed further, the Court would be desirous that it should not. I think, however, that the suit has been properly commenced, and I overrule the protest, and condemn the party in the costs.

BOWZER, AS GUARDIAN OF HIS SON, v. RICKETTS, FALSELY CALLING HERSELF BOWZER.

3d *March* 1791.

In nullity of marriage, by reason of minority, at the suit of the Father, a prayer, on the part of the wife, "that the Minor, now of age, might be called to declare, whether he would carry on the suit, or that otherwise she might be dismissed"—Not sustained.

THIS was a petition on the part of the wife, stating, that the libel had been admitted, but no issue given; that the suit had been commenced by the Father, as guardian of the minor, who is now of age; and praying that he may now be cited to appear, and carry on the suit in his own name, with intimation that the Court would otherwise dismiss the wife.

It was contended that, before issue had been given, it was competent to call upon the Minor to declare, whether he chooses to carry on the suit; for that, before issue given, a suit was not held to be commenced by the canon or civil law; and that in Defamation, where it was necessary that the suit should be commenced within a year, it was held in *Goldingay* v. *Hill* *, before Dr. *Calvert*, that issue should be joined within the year.—After issue, applications of this kind may have been denied, but before issue, it is competent to the wife to call on the Minor to declare whether he will carry on the suit.

On the other side it was replied, that in the case of *Shaw* v. *Page*, which was a very early, if not the first case argued under the marriage act, a question to this purpose had been agitated, whether the Father, having brought a suit in the minority of his Son, the Son should not be called on; but, in that case, the Son married again, and the proceedings dropped. Since that time, how-

* Arches, 1783.

ever, it has always been held, that where the suit has been brought by the Father in his own right, he would be entitled to proceed; and that if such suit was commenced only a day before the Son came of age, the Father might continue to carry it on, whether the Son was willing or not.—That in the present instance, the citation had been returned on the third session of *Michaelmas* term; and on the third session of *Hilary* term, the wife stood assigned to give an issue, when the Proctor alleged the Minor was then of age, which was not true: if this fact had not been alleged, the Court would have required an issue to have been then given.—It will be a question, therefore, whether the party shall take the benefit of a false suggestion, or whether this application should not be considered as if issue had actually been joined?

Judgment.

Sir *William Scott.*—In cases of this description the Court would not be inclined to maintain the objection; for it is the interest of both parties, that the suit should proceed, in order that they may know the exact legal relation, in which they stand to each other. The marriage act declares marriages in such cases to be *ipso facto* void,—the sentence of the Ecclesiastical Court is declaratory only, It does not make them void: If then I should dismiss the suit, it would not legalize the marriage, but the marriage might be questioned, upon any claim of the wife's, in any future transaction, in any Court where such claim was made. It is therefore proper, that the parties should know their situation in the early state of their cohabitation, and the Court would not be disposed to dismiss the suit, unless for very cogent reasons. Under the act of Parliament the Father

Father has an interest of his own, and though he proceeds as Guardian of his Son, he may be considered as proceeding *pro interesse suo*; for his own authority is violated.

BOWZER v. RICKETTS.

3d *March* 1795.

The consent of the Minor is not in any manner necessary for such suits; and in Lord *Courtenay*'s case *, the Earl of *Aylesford* proceeded as testamentary Guardian, after Lord *Courtenay* came of age; and though his authority was questioned, it was held that he had clearly such right. In *Perkins* v. *Allen* †, the same doctrine was recognized by Dr. *Betteswsorth*, in the Consistory Court. It is clear, therefore, that the Father may go on after the Minor comes of age, and if the Minor should appear in the cause, it would not abate the suit.—I do not know that it has been determined, that the Father or Guardian might commence a suit after the Minor had come of age; but I will not say that he might not, as in case of the Son's death, or other particular circumstances, it might be convenient that he should have such right.

In the present case, the suit was clearly instituted in the minority of the Son; issue was directed to be joined, and on that day the assertion was made, that the Minor was of age, which was not true, and on which the matter stood over. I think the party cannot take advantage of that false assertion, but must stand on the same ground as if he was discussing the question on that day. This suit was substantially commenced: the case comes therefore within the narrowest rules, and I am of opinion that the Father has a right to proceed.

* Consist. 1762. Deleg. 1763.

† Consist. 1778.

LINDO, BY HER GUARDIAN, v. BELISARIO.

5th *June* 1795.

Validity of Jewish Marriage, tried by evidence of the Laws of the Jews, as in cases of Foreign Marriage.—The asserted Marriage held invalid.

THIS was a case of jactitation of marriage, brought for the purpose of trying the validity of a marriage, according to the Jewish rites; instituted by the wife against the asserted husband.

JUDGMENT.

Sir *William Scott*.—This is a case which comes before this Court by the direction of the Lord Chancellor. Under the sanction of that high authority I shall certainly apply myself closely to the investigation of the question, though otherwise I should have entertained considerable doubt, if not on the jurisdiction itself, at least upon the propriety of exercising it in this case. The Ecclesiastical Court has an undoubted jurisdiction upon the general law of marriage, so far as the legality of that contract is constituted by the law of this country. It also examines questions of foreign marriages, in cases of *British* subjects, and sometimes of aliens; and it does this from necessity, in order to prevent a failure of justice; and with the satisfaction of knowing, that the principles, which regulate *English* marriages, are such as are also generally applicable to marriages of foreign Christian countries; the marriage law of *Europe* being founded on the same general principles, and having for its basis the antient canon law; so that there is not much danger that the Court can proceed wrongly on such general principles, and on such a basis. This is a question of marriage of a very different kind—between persons

LINDO v. BELISARIO. [illegible] 1795.

persons governed by a peculiar law of their own, and administered, to a certain degree, by a * jurisdiction established among themselves—a jurisdiction competent to decide upon questions of this nature with peculiar advantage, and with sufficient authority. It would, therefore, have been a matter of grave consideration with me, if the question had been brought in the ordinary way, and without any such recommendation;—whether it would not have been referred more conveniently to that tribunal to which I have alluded; for I can-

* On the state of the Jews in this country, see *Selden*, 3d vol. p 1459. *Molloy*, lib. 3. ch. 6. 1 *Atkyns*, p 41 and a pamphlet, 'Whether a Jew might hold lands, A. D. 1753, &c. They *appear* to have been brought here in considerable numbers by *William* I from *Rouen*, 1070. They were considered as merchant strangers, and were allowed to have *medietatem linguæ Judæorum*, 1 Edw. 1. *Selden*, 3d vol. p 1460. They had also the power of *excommunicating* their own members.—Special Justices were appointed "*ad custodiam Judæorum*," whose decisions, *in certain cases*, were *secundum legem et consuetudinem Judaismi*. *Selden*, ib *Molloy*, ib. They lived as bondmen of the kings, and under special protection, regulations, and exemptions, till they were banished, 31st *August* 1290 They did not appear again in this kingdom as a distinct body till the time of *Charles* II They had petitioned in 1618 to be allowed to return and enjoy their religion (*a*), and the question was much agitated, but nothing was done. On the Restoration, *Charles* II. promised them protection and the use of their religion, and an Order of Council issued to that effect (*b*)

Many Jews obtained Letters of Denization during that reign. They were not (*as it is believed*) mentioned in the exceptions in the Marriage Acts as projected in the reign of *William* III. though Quakers are. but they were included in the same exception in the Act 26 G. 2 ch. 33. Their state and condition having recently become an object of public attention on the discussion of the Act 26 *G*. 2. ch. 26. for the Naturalization of Jews, which passed in 1753, but was repealed in 27 *G*. 2. ch. 1. 1754.

(*a*) See Appendix, No. 1. (*b*) See Appendix, No 2.

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LINDO *v.* BELISARIO.

5th *June* 1795.

not but be sensible, that in applying the general principles of the law of marriage to this case, I may be adopting rules that are not duly founded, and which may prove highly inexpedient. On the other hand, if I am to apply the peculiar principles of the Jewish law, which I conceive is the obligation imposed upon me, I may run the hazard of mistaking those principles, having a very moderate knowledge of that law. I feel also the weight of the consideration, That a decision on the present question may affect a very numerous and respectable body of people. Under this responsibility I repeat that nothing but my respect for the high authority which has prescribed this duty, would have induced me willingly to undertake it. Being, however, under the necessity of addressing myself to it, I shall take care to use every caution respecting the means of information, and the manner of applying it, that my judgment can suggest: Under these observations I proceed to consider the particular question that is thus brought before me.

A libel has been given charging "that Mr. *Belisario* has boasted of a marriage which is not good "and valid in law." He has admitted the fact of jactitation, and, at the same time he asserts, as he has a right to do, the factum of the marriage, and its validity. The factum of marriage, I presume, was not the principal subject of the reference, from the high authority to which I have alluded; for, if that had been the question, it would have been referred probably to another mode of inquiry, on an issue directed to a jury, who would have been more capable of examining it than this Court. However, the factum comes before me; and I cannot help observing, that this part of the question

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has been rather singularly introduced. The Libel stated the Jactitation.—An allegation was then given in, on the part of the Defendant, stating the general law of the Jews, and asserting the factum of marriage agreeably to it, on which he relied, as being a complete marriage.—In answer to that, another allegation has been given in on the part of Miss *Lindo*, reciting what had been stated to be the law, and denying that such ceremony does constitute marriage, "*but only a betrothing*."—It proceeds in the second article to recite the factum, as alleged in the fourteenth article of the husband's plea, which is agreeable to the ceremony as before described, and denies that it did even constitute "a complete *betrothment*."

It appeared inconsistent, I own, that the first article of the responsive allegation should admit the ceremony of giving the ring in the presence of witnesses, and accompanied with certain words, to be a betrothment; and that the second article, which recites the same ceremony as having actually passed between the parties, should allege that it did not constitute a *betrothment*. There followed another allegation which the Court did not admit, because it appeared to offer no new information; and though it may be singular to notice what has been rejected by the Court, yet, as it comes out on the interrogatories, and in a case of this special nature, which calls for particular attention to all its parts, I may be permitted to make some observations upon it.

That allegation stated, that there was a tribunal among the Jews, composed of an Archisynagogus and Assessors,—persons of competent learning and abilities to decide their matrimonial questions; that they had called the parties before them, and, on deliberate examination, pronounced the ceremony

LINDO v. BELISARIO.

5th June 1795.

mony in question to be a *doubtful betrothment;* and that the asserted married woman, in this case, was a *doubtful betrothed.* I do not mean to impeach that sentence; but, according to our notions, it is not very intelligible, as expressed. Judges ought certainly to come, with minds open to all doubts, to the consideration of a question; in other words, they must not yield to hasty impressions, but they must ultimately decide those doubts; since it is the business of judges to send into the world, not doubts, but decisions; and they must make up their minds on one side or the other, on the balance of the evidence that is before them. The only way, in which I could reconcile this result of their deliberation, to any mode of proceeding familiar to us, would be to compare it to what might be a sentence *of failure of proof,* in our Ecclesiastical Courts, in a matrimonial cause. In which case, we well know, that such decision would not be definitive, according to the rule of the canon law, "*non transit sententia in rem judicatam contra matrimonium* *;" but the party might give supplemental proof, and so establish the marriage in subsequent proceedings. But if the law is otherwise amongst the Jews, as I have understood, this cannot be done; and I cannot think that this mode of pleading this sentence has been the most proper; because it should have been alleged, that when the judges had given a decision of *doubtful betrothment,* it was, in fact, a *definitive* judgment *against* the validity of that *betrothment.* If it had been so pleaded, this Court might have acted upon it, and have thought itself precluded from entering into

* X. 2. 27. 7.

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any further examination of the marriage. But without some such conclusive declaration, in the ordinary acceptation of the words, and without the assistance of any technical interpretation, the circumstance that it appeared *doubtful* to them, was a strong reason why this Court should proceed in the investigation of it. This Court, therefore, cannot consider the report of that tribunal, even if it was directly before It, as any bar to the present enquiry into the matter of fact, whether *that*, which they held to be *doubtful*, is a certain and existing fact or not. Having considered that subject, I must say, that I do not entertain doubts upon it.

It appears on the interrogatories, that the doubts, which were entertained by that tribunal, were founded on this,—that one of the witnesses could not distinguish which of the two young women present, was the person supposed to have been married by the ceremony described. A doubt was raised as to the identity; but, on the present evidence, there is no room for entertaining any doubt on that point: It had been pleaded in the allegation, that the man paid his addresses to the lady promoting this suit, and she admits that she is the party.

If there is no peculiar rule in the Jewish law, that a marriage cannot be established in point of fact, if one of the witnesses had a doubt about the identity, (and I cannot suppose there is such a rule as it has not been pleaded), I am certainly not concluded by that sentence; and, upon the present evidence, I find it impossible to entertain a particle of doubt, that a factum has really passed between these two parties. *That factum*, which, according to one statement, constitutes a marriage, but according

Lindo v. Belisario.

5th June 1795.

according to the other, only a betrothment. Upon the factum no doubt remains; and the only question that presents itself for decision is, which of the two descriptions, *betrothment* or *marriage*, is entitled to be considered as the true legal character, which belongs to it.

In proceeding to consider this question, it will of course be necessary to remove all circumstances that do not essentially belong to it; and I shall immediately exclude all imputation of fraud, because no such imputation is supported by the evidence. In the allegation, the Court permitted several circumstances to be pleaded, because it was not then known what effect the peculiar law of the Jews might give to those circumstances,—such as disparity of age, and of fortune, and the clandestinity of the engagement. But it does not appear that all the circumstances of this case as proved, taken together, can be held to compose a case, which I can judicially consider as a case of fraud. Such disparity of age, as exists in the present case, is by no means uncommon, and disparity of fortune is by no means demonstrative of fraud. I observe likewise there is no marked disparity between the families. As to the private manner in which the communication was carried on, it is a sort of artifice so much used, in the common habits ot mankind, in similar cases, that if I was to hold that to be material enough to invalidate a marriage, I might unhinge no small number of marriages in the kingdom. This objection is the less to be regarded in this case, because it does not appear that, by the laws of the Jews, the consent of the family is absolutely necessary, and therefore privacy is of the less importance.

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I shall next dismiss from the case every imputation of force; for there appears to have been as perfect a correspondence and concurrence of inclination as possible. The letters, which have been exhibited, breathe the warmest sentiments of affection on her part; and though she is said to be a very young person, she is, by the laws of the kingdom, as well as by the Jewish law, supposed capable of protecting herself against imposition and force, and competent to enter into any matrimonial engagement. In the letters written after the ceremony she declares herself to be his wife; and I observe, in the petition to the Lord Chancellor, the Guardians represent their fears that a marriage will very soon take place, unless the authority of that Court is interposed to prevent it. She was removed under the care of her brother for that purpose, and since she has been placed under the protection of the Court of Chancery, access has been denied to the asserted husband only by external authority; and there is no evidence of any force being attempted upon her: This Court therefore considers the question simply as a question of law on the validity of the marriage, abstracting all suggestion of force or fraud in the person against whom this proceeding is instituted.

The factum of marriage is described in the allegation, and has undergone so much discussion, that it is, perhaps, unnecessary to advert to it. The allegation, after pleading the letters, goes on to describe the factum of the ceremony to this effect: "That before sunset, and between eleven "and twelve o'clock in the morning of *Friday* the "26th day of *July* 1793, *Esther Mendes Belisario*, "then

LINDO v. BELISARIO. 5th June 1795.

"then *Lindo*, thereby meaning *Esther Lindo*, "spinster, the minor in this cause, went to and "met *Aaron Mendes Belisario*, the other party in "this cause, at the house of his brother, *Jacob* "*Mendes Belisario*, in *Little Bennet Street*, for the "performance of their marriage, and *Abraham* "*Jacobs* and *Lyon Cohen*, two credible persons of "the *Jewish* nation, attended at the said house to "be present at the ceremony thereof; that the "said *Aaron Mendes Belisario*, then in the presence "of the said *Abraham Jacobs* and *Lyon Cohen*, "addressed himself to the said *Esther Mendes* "*Belisario*, then *Lindo*, thereby meaning the said "*Esther Lindo*, spinster, the minor aforesaid, in "the words or to the effect following: 'Do you "know, that by taking this ring, (meaning a ring "which he then produced to her), you become my "wife?' to which she answered, 'I do.' That "he then said to her, 'Do you take this ring "freely, voluntarily, and without force?' to which "she answered, 'I do;' or they, the said *Aaron* "*Mendes Belisario*, and *Esther Mendes Belisario*, "then expressed themselves in words to that very "effect; and the said *Aaron Mendes Belisario* im-"mediately thereupon, in the presence of the "persons aforesaid, delivered to and placed upon "the fore-finger of the left hand of the said *Esther* "*Mendes Belisario*, which she tendered to him for "that purpose, and freely and voluntarily accepted "and received the said ring, and at the same time "repeated to her certain words in the *Hebrew* "language."

That is the ceremony which is described to have passed, and is *proved* to have passed between these persons. It comes then more to a question

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Lindo v. Belisario.

5th June 1795.

of law. On one side it is asserted that this is a complete marriage,—on the other side, it is alleged that it is not a marriage, but only a *betrothment;* and they proceed to state that, which, if true, is decisive of the whole question, that the ceremony essential to constitute effectual and complete matrimony is as follows:—"That a formal contract in the *Hebrew* language must be entered "into by the bridegroom with the bride, according to the formalities and rules of the Congregation; and such contract must be drawn up by "the Priest, and be signed by the bridegroom; "be entered and registered in a certain book kept "for that purpose by the Priest, and the entry "must be signed by the bridegroom and other "two witnesses, which being done, the original "contract is delivered to the bride." This being pleaded to be the ceremony which constitutes an essential and valid marriage, it would follow, that, as nothing of that kind has passed, there is an end of this pretended marriage entirely, if the law is proved to be conformable to this description of it.

In order to establish that proposition, three persons are produced, who compose the judicial synod, called the Beth-din. Some observations have been made upon the character of those persons, but without apparent foundation; and I am inclined to treat them with the respect due to their situations. I must, however, examine in what manner the proposition, which is advanced as the main issue of this cause, is proved; and I think I do not depart from that civility which I am inclined to shew to them, when I presume to think, that, from not perfectly understanding the form of words in the *English* language, or from

LINDO v. BELISARIO.

5th June 1795.

other causes of that kind, there appears some little inconsistency in their depositions.

The first person is Mr. *Julian*, who expresses himself nearly in the terms of the allegation: he says, "that the ceremony *essential* to, and which "constitutes an effectual valid and legal marriage "among the Jews, is,—that a formal contract, in "the *Hebrew* language, must be entered into by "the bridegroom with the bride, according to the "rites and ceremonies of the Jews, and the rules "of the Jewish congregation, to which the parties "belong, which is drawn up by the priest or mi- "nister who marries them, and must be signed by "the bridegroom and two witnesses before the "ceremony of marriage, and must also be entered "and registered in a certain book kept for that "purpose in the synagogue, or by the priest or mi- "nister of such congregation."

According to this opinion, if it stopped here, the position would be perfectly correct in point of law; but, in the very next sentence, I find what appears to me to be rather inconsistent; for it goes on to say, "that if a Jew and Jewess "having given and received the Kedushim, "the Jew was to say, in the presence of two "witnesses respectively Jews, that he was going "to have connection with such Jewess, in the "name of marriage, and then retired and had "such knowledge of her, it would be a good "and lawful marriage between such persons, "according to the Jewish law, and would be so "pronounced to be by the Bethdin." Every one must perceive that this is inconsistent with what had been said before; because it cannot be essential to the validity of the marriage, that the ceremonies described above should have passed,

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when it is in the next sentence declared, that without several of these ceremonies, a legal, valid, and effectual marriage may take place, to all intents and purposes.

The next witness is Mr. *Almoshino;* and he appears to be rather more familiarly acquainted with the force and meaning of *English* terms; since, in the original deposition, the word *essential* is corrected and altered for the word *customary;* and all that he ventures to say is, that the *customary* ceremony is That described in the allegation.

Mr. *Delgado,* the third witness, introduces this distinction. He says, "that the ceremony required by the Mosaical law is as follows:" He then describes it, and adds, "It is not required by the law of *Moses* that there should be a written contract; for though it is required by the Rabbinical law, it is not *essential;* and if a Jew and Jewess were to declare that they were going to retire, for the purpose above described by the other witness, and were so to retire, the same would be a good and valid marriage, although no ceremony is performed, and no contract entered into." Then I think we have established, so far at least, that the written contract is not essential; we have it completely so proved by witnesses, who are referred to as above all exception, and who speak not only with knowledge, but with authority, on this subject. What I infer from it is, that there exists among the Jews, as in many other communities and societies, a distinction between marriages *solemn* and *unsolemn;* that there are marriages which have certain solemnities attached to them, for the purposes of public notification, and for the complete satisfac-

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LINDO v. BELISARIO.

5th June 1795.

tion of the civil and ecclesiastical law, although not necessary for the purpose of validity.

There is also a particular exhibit introduced, to which the Court is inclined to pay great respect and attention; being a certificate signed by a person who was himself Archisynagogus, and by two assessors, in which the opinion of these persons is delivered corresponding with that expressed by the witnesses, but given by them on a case long prior to the present. That certificate states a case of facts like the present, and declares "the marriage to be valid." For they say, "In "conformity to your orders given to us, in virtue "of the memorial presented to you by Mr. *Benja-* "*min Mendes Henriques*, wherein he requested that "the contract of marriage shewn to us, bearing "date the 24th *April*, in the year 1776, should "be examined by us, that we might determine "whether the said marriage is valid according to "our holy law, and whether the children born "from the said matrimony are held as legitimate "or spurious? We say, that the said contract con- "tains a narrative of the Kedushim, which the "said Requirant, *Benjamin Mendes Henriques*, had "given, in presence of two witnesses, unto *Rabbia* "*de Matta Henriques*, with a gold ring, saying "the usual words; at the same time he put the "ring on her finger, and the witnesses declared "that the said *Benjamin Mendes Henriques* and "*Rabbia de Matta Henriques*, in their presence, "said, that they made this act of espousal of "their free and mutual consent, without force or "compulsion, and the said parties signed that de- "claration in presence of the said witnesses, who "likewise signed the narrative of the fact."

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Now, on this authority, those persons pronounce this marriage to be valid, and that the woman is prohibited from marrying again with any other person, notwithstanding other contracts of marriage before or after the Kedushim, unless after legal divorce, and that children born under that marriage are legitimate, &c. But they go on to observe: "But inasmuch as there did not follow to the Kedushim the nuptial benediction, "which, without exception, all Israel used; and "also as the said *Benjamin Mendes Henriques* did "not make unto his wife a *Ketuba* or marriage "contract, ordained and established by the law of "*Moses*, it is certain that they are living in *venial* "sin, but not *criminal*." It is clear, I think, that there was not a Ketuba, nor the sacred benedictions and blessings, yet the marriage was held to be good and valid.

LINDO *v.* BELISARIO.

5th *June* 1795

The addition that the parties are living in sin *venially* but not *criminally*, has been pushed too far in argument, when it is contended that the parties would not have the lawful use of each other's persons in the way of marriage; for, I conceive, it only means that they were offending against the orders of the Church,—that it was an irregularity similar to what is known to have existed in the books of the canon law, where it is held that marriages, though clandestine and irregular, are nevertheless valid. It is a distinction very familiar to the readers of the books of the Canonists, that practices and acts, frowned upon by the Church as irregular, and, on that account, partaking of the nature of sins and offences; are nevertheless not so mortal or deadly, as not to be venial, and to have their sinful character totally removed, by subsequent conformity to the public regulations.

 The

LINDO v. BELISARIO.

5th *June* 1795

The sin they commit is against public order, but will have no effect on the validity of the marriage: And it is to be inferred that these parties, in the performance of the personal duties of marriage towards each other, are not doing any thing which is thought inconsistent, to any further effect, with the laws of marriage.— The inquiry then is narrowed to this question, whether what was done in the present case was sufficient or not? It being proved, that the whole of what is stated in the allegation to be essential and necessary, is not essential and necessary. Was then enough done in this case? Before I examine that point, I will venture to say a few words on the nature of the marriage contract.

The opinions which have divided the world, or writers at least, on this subject, are, generally, two. It is held by some persons that marriage is a contract merely civil—by others, that it is a sacred, religious, and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of this subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not *merely* either a civil or religious contract; and, at the present time, it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature, antecedent to civil institution, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts, to live together. Our first parents lived not in political society, but as individuals, without the regulation of any institutions of that kind. It is hardly necessary to enter

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LINDO *v.* BELISARIO.

5th *June* 1795.

something of a protest against the opinion, if any such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation,—That, in a state of nature, would be a marriage, and in the absence of all civil and religious institutes, might safely be presumed to be, as it is popularly called, a *marriage in the sight of God.*

It has been made a question how long the cohabitation must continue by the law of nature, whether to the end of life?—Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes, of a more permanent nature, in the intention of the parties.—The contract, thus formed in the state of nature, is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it, on very different principles, in different countries. In some, there is a *communio bonorum.* In some, each retain their separate property. By our law it is vested in the husband.—Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them.

In most countries it is also cloathed with religious rites, even in rude societies *, as well

* Hockmannus de Benedictione Nuptiarum, c. 2. s. 3. "Non "minor fuit Paganorum circa conjugia religio, &c."

LINDO v. BELISARIO.

5th June 1795.

as in those which are more distinguished for their civil and religious institutions. Yet in many of those societies, as I have had occasion to observe, they may be irregular, informal, and discountenanced on that account,—yet not invalidated. *Scotch* marriages have been mentioned.—The rule prevailed in all times, as the rule of the canon law, which existed in this country and in *Scotland*, till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world, at this day, that a mutual engagement, or *betrothment*, is a good marriage, without consummation, according to the law of nature, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements which they purport to describe. If they agree, and pledge their troth to resign to each other the use of their persons, for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The vinculum follows on the contract, without consummation, if expressed in present terms; and the canon law itself, with all its attachments to ecclesiastical forms, adopts this view of the subject, as is well described by *Swinburne* in his book on Espousals, where he says "that it is a present and perfect consent, "the which alone maketh matrimony, without "either public solemnization or carnal copulation, "for neither is the one, nor the other, the essence "of matrimony, but consent only." *

Now the ceremony which is described to have passed in the present case, would certainly be a complete marriage by the law of nature; for, besides

* s. 4.

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verbal declarations, made in the presence of two witnesses, there is the delivery of the ring—a form, which has found its way into the marriage ceremonies of most countries; and it is the very symbol of marriage, and the particular act, in our country, that gives a character to the whole ceremony; since we say "with this ring I thee wed." There being then this ceremony, which is more than enough by the law of nature, the question is reduced to this, whether the institutions of the Jews hold it to be *insufficient?* It has been said truly that the law of Moses stands very much on the law of nature; for that it has not prescribed any formal ceremony of marriage. It is clear, however, that there are legal institutions to which the Jews adhere in practice, and which I must consider as having the force and effect of laws, materially bearing upon the present question, and those are the laws derived from the institutions of the Rabbies.

Now it appears that, under those institutions, a distinction exists between *betrothment* and *marriage;* nearly the same as between the *sponsalia* and *nuptiæ* in the Christian canon law; and that the ceremony, alleged to have passed in this case, is called the betrothment, and not the marriage. A distinction, however, of that sort will not decide the question, because it may be little more than nominal, and not of substance; and it does not follow that because there is such a distinction in terms, it may not possess the very essence of matrimony. The opinion of the learned men who have said "that it is only a betrothment," will not decide this question *negatively*; and I must, in order to find out its real character, look to the effect produced on the parties by this act of *betrothing,* and

LINDO v. BELISARIO.

5th June 1795.

and from thence I must judge, as well as I can, in what degree it has the essential features and character of real matrimony.

I have already stated the difference of opinion, in the depositions of these persons, on the necessity of a full ceremony to constitute a valid marriage. There is also, and I make the observation, without any disrespect to their judgment, on any supposition that they could mean to mislead the Court, some apparent difference of opinion on the effects of Kedushim—that is, of the solemn and mutual declarations made, in Hebrew terms, at the delivery of the ring. Mr. *Julian* says, "that "the delivery of the ring is part of the ceremony of "the marriage, *which* is necessary to make it com-"plete, and without *which there can be no marriage*." According to him then it is a necessary part of the marriage.—Mr. *Almosnino* says, "that such Ke-"dushim, or delivery of the ring, does not consti-"tute an effectual or valid marriage among the "Jews, although it is now *customary* that *the cere-"mony of marriage* follows that of the Kedushim "immediately, if it had not previously been done." The third witness consulted, Mr. *Delgado*, concurs with the first, and says, "that it is an *essential* "ceremony; for that the delivery of the ring im-"plies, that the Jewess has accepted the same as "her price for which she had sold or dedicated "herself." So that it is an actual sale and transfer, and that which gives the husband a property in her person. They all, however, agree in this at least, that without Kedushim and the ring, the contract, and the nuptial benediction of the seven blessings, amount to nothing. Then the matter stands thus, according to the opinion of all the witnesses, who say in effect that Kedushim is an essential and indispensable

Lindo v. Belisario.

5th June 1795.

dispensable ceremony, and that the rest without it will not constitute marriage: since they all say, that the contract and benediction without that will not entitle the parties to live together; that a divorce is not necessary to separate them, and is never granted; and therefore, undoubtedly, we have got so far—that it is an *essential* part of marriage. I collect this, I think, from the opinions of all these persons, from two, absolutely expressed, and by implication from the other.

What are the effects of Kedushim then? In the first place, the woman cannot marry any other man—she is separated from all mankind as the property of one individual; that is one feature of the matrimonial contract, and it is impossible to describe it in stronger terms. In the next place, the consequence accrues, that she may be guilty of adultery, and is liable even to infamy and punishment, if she has intercourse with any other man;—that also is a pretty strong feature of marriage: the guilt of adultery can arise only on a supposition of a marriage having been completed. In the third place, she cannot be separated but by legal divorce, in the same manner as if an actual marriage had intervened. In the fourth place, I observe in the laws of the Jews, that a person, committing a rape upon a betrothed woman, is liable to be punished, just as in the case of the rape of a married woman. I am enumerating now on the one side what are the circumstances in which this ceremony corresponds with marriage, and *these* are pretty strong recognitions of a matrimonial character. On the other side there are distinctions to the disadvantage of this character; but they are chiefly civil and temporary distinctions, and relate merely to property. It appears that a Jewess, thus betrothed, is perfect and

LINDO v. BELISARIO.

5th *June* 1795.

and entire mistress of her own property, not only in the use of it, but also in the disposition; since she can give it to whom she pleases by testament. In the next place, the husband is not obliged to maintain the betrothed out of his property. In the third place, she is not entitled to dower from the property of the man; and he is not entitled to any part of her property in case of her dying intestate. These are the imperfections of the contract as to civil effects.

I observe, in the deposition of Mr. *Solomon Lyon*, a circumstance which is not noticed by the other witnesses, and which may be material. He says, "that where a Jew obliges himself to give his "daughter a marriage portion, and she should re-"ceive the Kedushim; the man, from whom she so "takes it, could not recover the portion from the "father, though he might from any other person, "if the father was dead and the Jewess was of age, "which is thirteen years." Therefore if this opinion is correct, on the death of the father, where a portion was left, the person giving Kedushim would be entitled to recover, as he would have a vested right in the effects of the woman.

Now, looking at the ceremony which has passed, in these different views, with reference to the circumstances that are favourable and unfavourable, I see, on the one hand, strong recognitions of the *vinculum matrimonii;* on the other, certain disabilities as to property: but Rights of property have nothing to do with marriage considered as to the *vinculum;* and then the question arises, Is this contract, so qualified, a marriage, or is it not? I think I may infer from all the witnesses on both sides, that if consummation had actually passed, at least with the ceremony of Hupa, (which is the

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declaration, in the presence of witnesses, that he was going to retire, for the purpose of consummating his marriage, and had so retired), it would be a complete and perfect marriage. I collect this from the depositions of all the gentlemen, and from an opinion given by Mr. *Azevedo*, in a former cause which had occurred among the Jews; and therefore the question is, whether it can be presumed that consummation has taken place? There are some reasons which would incline one to suppose that it had. For it appears that this was an engagement entirely agreeable to the inclinations of the young woman, who writes in language of affection, and in the character of a wife. It appears, also, that the parties had frequent opportunities after the ceremony, and that for some time he continued to have access to her. Considering these circumstances, and particularly the age of the parties, the man being twenty-nine, and the woman sixteen, it might naturally be presumed that consummation had passed. But it is a strong fact on the other side, that he has not pleaded the consummation, being aware that it would be of great consequence that it should be pleaded; and I lay great stress on that omission. No application has been made to the Court to rescind the conclusion, in order to admit the pleading of that fact, and therefore the legal inference is, notwithstanding the general probabilities to which I have adverted, that consummation has not passed.

Then the question is reduced to this, Is the ceremony without consummation a complete marriage? I have already stated, that, by the law of nature, this would not be essential; but it may be so by special civil and religious institutions, and there are different systems of matrimonial laws in the world

LINDO *v.* BELISARIO.

5th *June* 1795.

world by which it is rendered necessary. Whether it is so by the law of the Jews, is not sufficiently established by any evidence which is before me. There does not appear any distinct proof, from the opinions of the Bethdin negatively, that consummation is absolutely necessary. They admit that Kedushim is *betrothment*, but that may be a nominal and verbal distinction only; and they say, that though there ought to be a written contract and benedictions, yet consummation after Kedushim, without a written contract, would be a perfect marriage; but they do not go so far as to say, that a solemn engagement, not followed by consummation, may not be a complete and valid marriage. There are persons who are examined on the other side, and amongst others, Mr. *Lyon*, who says "that Kedu-" shim alone is sufficient without consummation."

Observations have been made on the credit of these persons, as being in low situations of life; but it is the habit of the Jews to mix the pursuit of religious studies with secular employments, and they have not a numerous body of men secluded from the business of the world as we have. Some of their Priests, without any degradation, follow likewise other occupations; this is the case also with some members of the Bethdin; there is no call upon them, and no expectation to the contrary, and therefore the weight of their opinions is to be considered, without much disparagement arising from this circumstance. The opinion of these persons is, that "without consummation " there may be a valid marriage," although some intimation is conveyed, though not clearly and distinctly expressed, of the opinion of the Bethdin to the contrary. If their opinions were clear and consistent

consistent on this point, they would be acted upon by this Court; but I have considerable doubts on the effect of the answers given by the witnesses on the question—Who are the Rabbies whose opinions are mostly followed by the Jews of the *Portuguese* community? I think I shall not transgress the limits of my duty, if I look beyond the evidence, but not farther than the evidence fairly leads, as this evidence is not clear and positive on the interrogatory—what are the Rabbinical authorities most attended to by the *Portuguese* Jews? The answer is, *Maimonides* and *Beth Joseph.*

To the character of *Beth Joseph* *, I must acknowledge myself to be an entire stranger. The name of *Maimonides* is familiar enough to all literate persons, as the name of a very learned and eminent scholar, who digested and abridged the Talmud. I understand that his Commentary is considered by many, as almost of equal authority with the text. Of *Beth Joseph,* also, I am informed that the book is an authority of great weight, and that the author is above all exception, in respect to his integrity and erudition. These therefore are opinions which it would be highly desirable to obtain; for those, who give them, were persons who have delivered their doctrines on general principles, without looking to particular cases, and without influence of any personal nature. They would therefore be witnesses of the highest character, whose fame has diffused itself among Christian Scholars, also, as well as Jews, and towards whom the Court would, upon every consideration, be disposed

* *Beth Joseph* appears to be a commentary upon the Jewish Law, composed by a writer of the name of *Raburn Ashur, infra,* p. 255. The terms of the evidence have been retained, though they may seem rather to describe a person.

LINDO *v.* BELISARIO.

5th *June* 1795.

to join in the general respect which is paid to them upon every question of this kind. A passage has been quoted from *Maimonides*, according to the translation of Mr. *Selden*, "quamprimum puella "acquisita est et sponsa facta, citrà coitum, ci-"tràque deductionem verè uxor esset, adeoque "etiam ut quisquis præter sponsum, cum ea rem "haberet, is ultimo supplicio, ut adulter, esset "puniendus. Nec sine libello repudii, post ma-"trimonium seu sponsalia ejusmodi potuit ejici." * *Selden* says, that this was the general doctrine, and refers to the Talmud, Misna, Gemara, and to the ancient and modern Doctors. †

As to the other authority, that of *Beth Joseph*, I find that opinion quoted by Mr. *Lyon* in these words, "that a marriage by Kedushim alone can-"not be invalidated:" from which I conclude, that if the ceremony of Kedushim has passed, and that only, it is a complete and perfect marriage. I will mention also what I find in *Brower*, that *Philo*, from whom Christians take very much their notions respecting the rites and ceremonies of the Jews, has a passage to the following effect: "Sponsa-"liorum eadem quæ nuptiarum vis est, cum viri "et uxoris nomina, atque alia quædam in con-"ventu et frequentiâ propinquorum perscripta "sunt." It is true that he adds, "Sponsalia nup-"tiæ non erant, sed nuptiarum promissiones;" but he adds further, "earundem vi[illegible]um quatenus con-"jugii vinculum, fides conjugi servanda, amor, "dilectio conjugalis spectantur." ‡ Now, if one could depend on these opinions of *Maimonides*, as

* Lib. 2. c. 1.

† For a summary account of these writings, and the general character of the writers, see Appendix, No. 3.

‡ Brower de Jure Connubiorum, lib. 1. c. 24. s. 2.

delivered

delivered by Mr. *Selden*, and of *Beth Joseph*, stated on oath by Mr. *Lyon*, I think they would be sufficient to decide this question, and ought to be received with perfect acquiescence.

I must here observe, that another consideration occurs on this state of the evidence, which may be material: Whether, in consequence of the Kedushim, supposing the consummation not to have passed, the man may not acquire the right to that consummation? It is stated by *Brower*, who may perhaps not be perfect authority on this subject, being himself not a person of that nation, that either party may be compelled to cohabitation, "*ad perfectionem matrimonii cogi sponsus,* "*sponsaque potuit* *;" but it has been said, that this Court cannot enforce that obligation, and that it will not attempt to exercise such authority. It is asserted, also, that there is no such authority among the Jews; but if, according to the ecclesiastical law of the Jews, a wife is obliged to comply with such a demand, I conceive there must be power in the Jewish Communion, by spiritual censures, or by some other mode, to compel due submission to it. I do not think that it is open to the supposition that such is not the law of the Jews, merely because it is not aided by the civil authority of this country, and that it may, on that account, be prevented from being carried into complete effect. On all views of probability, one is led to suppose that there must be such obligation, if the husband insists upon it. There is sufficient proof of the *vinculum matrimonii;* and what can the force of that be, unless it binds the parties at least to that cohabitation, which pre-

* *Brower*, ut supra.

LINDO v. BELISARIO.

sumes the mutual use of each other's persons. For what inferior binding can there be?

5th June 1795.

It appears that a public celebration is not necessary, since the Hupa is as private as any ceremony can be. It is a mere declaration before witnesses, that the man is intending to consummate; and if he retires with his wife for that purpose, it is a completion of the marriage. There is then, on this state of the parties, more than the mere contract "*per verba de præsenti*" in the *Christian Church* *, which was a perfect contract of

25th June 1795.

* In *La Costa* and *Villa Real*, there was a case, of considerable notoriety at the time, brought before the Court of Arches, to enforce a contract of marriage between two opulent persons of the Jewish religion, from which it might be inferred that such a principle was not inconsistent with their own law.

It was a case of marriage contract *per verba de præsenti*, in which Dr. *Betteswor th* observes, on some argument of Counsel relating to the authority of the Court:—"An objection has been "made, which is new in my opinion, that this is an irregular "application, because the case was between persons of a different "religion, and therefore not to be done and solemnized *in foro* "*ecclesiæ*, that is, as I apprehend, it could not be done in their "way. It would be very extraordinary indeed, if the Court was "persuaded, that it had full proof, that the parties had contracted, or bound themselves to each other in marriage, and "that, at the expiration of the time agreed on, he demands, "and she refuses to perform. I say this would be fruitless, if "the Ecclesiastical Court was not possessed of an authority to "decide therein. But I think this Court is possessed of that "authority; and I know not where else persons could have any "remedy except here."—That case is described in the Libel to have been brought originally in the Court of Arches—on the part of *Jacob Mendes de Costa*, of the parish of *St. Peter le Poor*, against *Catherine de Costa Villa Real*, of the parish of *St. Michael Hostis in Royola, London*. The question appears to have been discussed on the effect of the lady's promises to marry "at the "end of the year from her husband's death, if her father should "consent." The judgment of the Court decided that it was not an absolute promise, but conditional, and dismissed the cause.

The

of marriage law, though public celebration was afterwards required by the rules and ordinances of the canon law. In the Jewish law it is not so, as the man appears to have had a *vested right* to call on the woman to submit, and no public ceremony was required for that purpose of consummation. Then here the man had the vested right, and there is no reason to suppose that there would be opposition to it; since it is stated, in the application to the Court of Chancery, that it was the apprehension of the guardians that it would be carried into effect.

This, then, is the footing on which these parties stand. If the opinion of *Maimonides* can be relied on, they are actually man and wife; and, according to the other opinions, it is to be presumed, that if the injunction of the Lord Chancellor was relaxed, they would be man and wife, without any further celebration. The man has the moral right, and I should presume also, according to the Jewish Church, a legal right to call on her to submit.

Having to decide on this question, which is perfectly new, and which may affect the rights of a great body of *British* subjects; feeling myself to be on novel ground, on which doubts ought to be entertained, and questions sifted with great caution, and being unwilling to proceed to the decision of this question without fuller information on this important part of it, I shall adopt the prudent measure of framing a few particular questions, which I shall address to the Bethdin,

The case was also the subject of an action at common law on the contract of marriage; when the Court held the sentence of the Ecclesiastical Court conclusive against the contract, 2 *Strange*, p. 661. See also the Duchess of *Kingston's* case, State Trials, 20th vol. p. 397.

and

LINDO v. BELISARIO.

5th June 1795.

and on which I shall request the assistance of the Counsel in drawing up, giving either party the opportunity of taking any other opinion upon them. The substance of these questions will be, First, whether, as stated by Mr. *Lyon*, it is the interpretation of *Beth Joseph*, that the Kedushim alone constitutes valid marriage? Secondly, whether the Bethdin will declare if the opinion of *Maimonides*, as cited by Mr. *Selden*, is erroneous? Thirdly, whether, by the law of the *Jews*, a person who has entered into Kedushim has a right to demand from the wife, that she shall submit to perform the duties of a wife in the way of matrimony? There may be others which I may find it necessary also to add to these, to satisfy my judgment more fully on this important question. When I have received the result of these inquiries, I shall endeavour to discharge the remainder of my duty towards the Court of Chancery, and to the parties.

4th Aug. 1795. 16th Sept. 1795.

On a subsequent day, this cause came on again, on the Answers of the Bethdin, to the Questions proposed by the Court; viz.

1st.—Whether it is admitted that *Beth Joseph*, who is proved in this cause to be one of the principal guides of the *Jewish Portuguese* Church, has laid it down that the Kedushim alone cannot be invalidated?

2d.—Whether the assertion of *Maimonides*, as cited by Mr. *Selden*, Uxor Ebraica, l. 2. c. 1., in which it is declared, that the woman who has received Kedushim is *vere uxor*, truly a wife, although consummation hath not passed, is an assertion without foundation?

 3d.—

3d.—Whether the passages in the Misna and the Gemara, referred to by Mr. *Selden*, in confirmation of this assertion, do or do not support the same?

4th.—Whether a man, who has given Kedushim, has not a right acquired thereby to call upon the woman, who has accepted it, to submit to conjugal embraces? and whether the woman, who has received the same, is not bound in conscience, and in law, to submit thereto when duly called upon?

5th.—Whether a woman can be dismissed after Kedushim except for such reasons as are legitimate causes of divorce after marriage?

6th.—Whether a man, who has married a wife by the ceremony of the Hupa but without a Ketuba or marriage contract, is entitled to demand the marriage fortune from the father or family of the wife?

7th.—Whether a wife so married is entitled to dower?

JUDGMENT.

Sir *William Scott.*—In the application of the principles of the Jewish law, and Jewish forms, to a question *like this*, which has been sent to this Court to be decided, it is not matter of surprise that some misapprehension or some apparent inconsistency should intervene. And I think there has been some confusion of this kind, which I am now enabled to explain. It was pleaded in the first article of Mr. *Belisario*'s allegation, which was given in an early stage of this cause, that the ceremony, which constitutes a valid and legal marriage amongst the Jews, is performed in a manner which is there described. But, in a subsequent

LINDO *v.* BELISARIO.

4th *Aug.* 1795.
16th *Sept.* 1795.

sequent allegation, on the part of the wife, it is pleaded, that the ceremony so described is not a valid marriage, but only "a betrothing;" yet, in the following article of the same allegation it is pleaded, that the factum, as pleaded by the husband, according to such ceremony, does not constitute a complete *betrothment.*

I think I find the solution of that apparent inconsistency in an allegation, which was afterwards introduced but rejected; and, I still think, properly rejected by the Court. It was there pleaded "that the Bethdin, a domestic forum of the Jews amongst themselves on matters of this sort, had pronounced the ceremony in this case to be a *doubtful betrothment;* which I now apprehend is to be explained by what was pleaded in the article of the allegation to which I have alluded,—that it was *not a complete betrothment.* In the form in which this sentence of the Bethdin was pleaded, it was impossible to understand any thing more than that they had enquired into the proofs, and could not satisfy themselves as to the fact, and that it had been in that sense pronounced a *doubtful betrothment.* It was not stated, that there was a distinction on this point, in the Jewish law, or that there was a particular species of betrothment known to the Jewish law under this description. It was merely stated as a *doubtful fact,* without any information to the Court, as to the rules of law, by which it was so determined. They said only "that they had examined into the case, and found it *doubtful.*" That sort of information appeared to the Court to be perfectly useless, and on that account that allegation was rejected.

But

LINDO v. BELISARIO.

4th *Aug.* 1795, 16th *Sept.* 1795.

But it appears now, when we have the evidence before us, and have drawn the business nearly to its proper point, that the plea, on the part of Miss *Lindo*, ought to have been framed in this manner. It should have alleged, NOT *the law* of marriage, as it was there* described, and which their own witnesses have disproved, by saying, that the marriage may be good and valid though not regular and formal; but it should have alleged, "that a "contract like that into which Miss *Lindo* had "entered with Mr. *Belisario*, was not a valid mar-"riage;—that it was at most only a betrothment, "and a *betrothment of a doubtful nature*, which "was a description of betrothment known to the "Jewish law, and *defective in legal validity*."

If a plea of that sort had been set up, and witnesses examined upon it, I should have seen the bearing of the question, and the party would have had the benefit of the principles and rules of the Jewish law on that point; whereas, by pleading a law which is erroneously stated, and a ceremony which is described by their own witnesses to be a *doubtful*

* "That the ceremony essential to and which constitutes an "effectual valid and legal marriage among Jews is as follows, "to wit, That a formal contract in the *Hebrew* language must be "entered into by the bridegroom with the bride, according to the "rites and ceremonies of the Jews, and the rules of the Jewish "congregation to which the parties belong, and such contract "must be drawn up by the Priest or Minister who marries them, "and be signed by the bridegroom and two witnesses, and must "be also entered and registered in a certain book or books kept "for that purpose in the Synagogue, or by the Priests or Minis-"ters of such congregation, and the entry thereof must be signed "by the bridegroom and two witnesses, which being done, the "original contract is always delivered to the bride." *ut supra* p. 225.

LINDO v. BELISARIO.

4th Aug. 1795. 16th Sept. 1795.

betrothment, without explaining in what that doubt consists, the plea left the Court without the necessary information, and It found itself under an impossibility of giving a definitive sentence upon it.

The law set up by Miss *Lindo*, had been disavowed. It was necessary therefore to be informed what the law actually was, on which the party meant to rely. It appeared, after the argument upon the subject, and on due consideration of the evidence, that the main point in the case was narrowed to one or two questions—whether a *nudum pactum*, of the kind described, without consummation, was a complete marriage—and further, whether upon a *nudum pactum* of this kind, the party had a right to compel the woman, by the Jewish law, to a surrender of her person in the way of matrimonial rights? because if this right attached to the husband by the Jewish law, I should be inclined to hold what has passed in this case to have constituted a valid marriage. These I consider to be the real questions between the parties. For I think it was proved very satisfactorily, that if the ceremony had been accompanied by consummation, it would have been, according to the laws of the Jews, a valid marriage. In order to obtain the necessary information on these points, I directed questions to be addressed to the Tribunal of the Bethdin; and the answers to these questions have now been received. It is no objection to the free use of these answers that they are *not upon oath;* because I receive this as information on foreign law, upon which the Court is to determine, furnished by persons professing that law; and it is in the experience of all of us that such informa-

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tion is usually received in this form; and I learn on enquiry, from those who are well versed in the practice of the Court of Chancery, that it is the usual practice of that Court, to receive information on foreign law in the same manner,—*not on oath,*—but on a reliance in the honour and integrity of the Professors of that law. If there is any doubt, or intention to raise a doubt on this point, I could wish that it might be intimated before I proceed further; because the consequence would only be that the cause must be opened, and the opinions of these persons must be taken at great expence and under great delay, in the form of depositions. Finding that no objection is made, I shall proceed without reserve to use the answers which have been communicated to me.

The first question, on which I required further information, arose out of the deposition of Mr. *Lyon,* who had stated "that *Beth Joseph* was a "guide of the Jewish Church of the highest autho- "rity in such cases:"—and on the fifth interrogatory he says, "that according to the Jewish law "given by *Moses,* the only ceremony necessary "to constitute marriage, is that of the Kedushim, "but that, since that time, the Rabbies have "added the Ketuba; that in *Beth Joseph* it is "said, that a marriage by Kedushim alone, that "is without consummation, may be so far good, "that it cannot be invalidated."

The answers which I have received come from the Bethdin of the Jews, and from two Rabbies. The Bethdin say, "that when Kedushim is given, "with all the circumstances necessary for the per- "formance of the ceremony, and the parties

"labour

LINDO v. BELISARIO.

4th *Aug.* 1795. 16th *Sept.* 1795.

"labour under no disability of age, consangui-"nity, affinity, mental disability, or pre-contract "in the female—and the ceremony was then per-"formed in the presence of two competent wit-"nesses—that ceremony is termed by the He-"brews *positive and complete betrothment;* but "when any one of the circumstances, which are "absolutely essential, is wanting, it is then no "Kedushim at all, and is null and void. If, from "the evidence of the witnesses, it cannot be in-"ferred, whether all the circumstances necessary "for the perfection of the ceremony, as where "there is ground to suspect the qualification of "the witnesses, or the ability of the parties; it is "pronounced a *doubtful betrothment,* for it hath "peculiar effects; and such a decision is a com-"plete and excellent judgment from a Jewish tri-"bunal, it being conformable to the Jewish laws. "In each of these instances, respectively, the tri-"bunal neither renders valid nor invalid, nor "doubtful, but merely applies the law to the fact. "In a fourth instance, it may be said that the "Kedushim can be invalidated, and that is when "the betrothment has been effected with all requi-"quisites, both in perfection of act, ability of par-"ties, and qualification of witnesses; but if the "parties, in the performance of that act, have "trespassed on some Rabbinical injunction, and "transgressed some bye-law instituted for the "good order of society, those Kedussin are "voidable, and can be invalidated by the Bethdin; "for there is an established rule in the Talmud "that says, 'Whoever gives Kedushim, it is with "the approbation and consent of the Rabbies:' "the

" the Bethdin can render the Kedushim invalid, " by alienating, *ab origine*, that property, whereby " the man effected the betrothment; or even if it " were effected by carnal intercourse, by constituting that act an act of prostitution. Every " Bethdin, of whatsoever time and place, may exercise that discretionary power; but we never " assumed that authority, because we do not find " upon record any precedent, wherein our predecessors exercised that power, though warranted " by law. All that we have said here is not only " the opinion of the author of *Beth Joseph*, but of " every learned Jew."

It is then asserted by these gentlemen, as I understand them, that wherever there is a defect of ceremony, which the rules of the Rabbinical law prescribes, it is in the power of the Bethdin to set aside a marriage deficient in any of those particulars. One of the private persons who has been examined, Mr. *Lyon*, answers: ' I know well that " *Beth Joseph* says, ' that the Kedushim, *if properly given*, cannot be invalidated; and the " woman is called *Eshet-ish*, which means the wife " of him who gave her Kedushim for every legitimate point of marriage.' "

Mr. *Ish Yemene* also says on this subject, " that " any man of knowledge will understand, that his " opinion must be, that when any woman has taken " Kedushim, in the presence of two witnesses, " with her free will, it is perfect Kedushim, and " she is called *Eshet-ish*." He cites certain passages in which it is laid down, in *Beth Joseph* and in others, " that what constitutes marriage is " the Kedushim." The witness concludes, " that " from all this it is proved, that, according to the " opinion

LINDO v. BELISARIO.

4th *Aug.* 1795. 16th *Sept.* 1795.

"opinion of *Beth Joseph*, no Kedushim *properly* "given can be invalidated."

The second question, or rather the second and third, which may be considered together, arose out of the depositions of Mr. *Ish Yemene*, who refers to *Maimonides* as an author of very high authority; and the Court was much impressed with a passage from his works, said to be found in Mr. *Selden*, in which is described the particular position, on which I wished to be informed—"Whether a woman, having re-"ceived Kedushim, was a complete wife, notwith-"standing matrimonial intercourse had not passed?" Mr. *Selden* refers to certain passages as well in the *Misna* as in the *Gemara*. The answer to that question is in these terms: "The assertion made "by Mr. *Selden*, that the woman, who has received "Kedushim, is *verè uxor*, is unfounded; for the "faithful translation of the *Hebrew* words is an ap-"pellation applicable both to a woman who is simply "betrothed, as also to a married woman, wife or "*uxor*. But the special name for a married woman "is, in the Rabbinical style, Nessua, *taken*, *nupta*; "and in the Scripture style, Behulah Behal, *Lorded* "of or by *a Lord*. Mr. *Selden* is right in what he "asserts, 'That if any man, except the Betrother, "should have connexion with a woman, though "but simply betrothed, he would incur the punish-"ment of death. And also, that to be released "she must have a divorce; for, in this respect, she "is like a married woman.' It is merely as to "the punishment of death that Mr. *Selden* refers "to the *Misna* and *Gemara*, and not to the asser-"tion of *verè uxor*; for, on that very passage of the "Talmud, as in every other passage of the same, "the Talmud calls the woman, who has accepted "Kedushim,

"Kedushim, *Mehorassa*, or *Arussa*, betrothed, but "not *Nessua*, *taken*, as corresponding with the *English* word *married*."

I understand then from this representation, that there is a word applicable both to a *betrothed* woman, and to a *married* woman; but that there is also another term *peculiar* to a married woman; and that Mr. *Selden* is understood to say that a woman, so betrothed, is *verè uxor*, to the effect that she cannot be separated but by divorce, and that a person, having intercourse with her, commits adultery, and becomes liable to the penalties and punishments attending it; but it is not understood to convey a general assertion that she is *verè uxor*, to all intents and purposes.

The private persons who have been examined on this question, give rather a different account. Mr. *Lyon* is unacquainted with the *Latin* tongue, and all that he can say is, "that Eshet-ish means wife "of him that gave the Kedushim, and she is pro-"hibited to all the world." Mr. *Ish Yemene* is ignorant of the *Latin* tongue likewise, and confines his answer upon this question to his belief of the authenticity of the citations of *Selden*, so far as he collected them.

The next question, which appears to go to the point in issue was, "whether a man, who had "solemnly given Kedushim, has not a right to call "on the woman to submit to conjugal embraces, "and whether she is not guilty of a breach of "marriage if she refuses to submit?" The answer of the Bethdin is, that "a man, who has given "Kedushim, is so far from having a right to call "upon the woman, who has accepted it, to con-"jugal embraces, that, on the contrary, the parties

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LINDO v. BELISARIO.

4th *Aug.* 1795.
16th *Sept.* 1795.

"are forbidden to have connubial intercourse in "the state of betrothment, and would commit a "sin, and would incur corporal punishment by so "doing; that the right, which the man acquires "in the betrothed woman, is that he can demand "of her to prepare for being admitted to the "matrimonial state, within a convenient time; and "when that period is expired, it is expected that "she will surrender herself to enter the Hupa, "which constitutes marriage; but she is not "bound in conscience and in law to submit "thereto. The consequences of non-compliance "are, that she will be called before the Tribunal, "and interrogated, why she does not fulfil the "marriage promise? If she says, that her non-"compliance proceeds from *aversion*, and that she "detests the man,—then he is ordered imme-"diately to give her divorce, and would be legally "compelled so to do in case of refusal. But if "she alleges frivolous excuses only, the Tribunal "will admonish her, and if that proves ineffectual, "she is to be called out daily in the Seminaries and "Synagogues for four successive weeks, and if she "continues intractable, at the expiration of twelve "months, the man will be compelled to divorce "her."

According to this explanation, notwithstanding she has received Kedushim in the most solemn form, she may assert her dislike, and the man will be compelled to divorce her. If this be the case, undoubtedly it is impossible to say that there is a *vinculum conjugale* existing between the parties: It is a contract which binds to nothing, and is determinable at her own pleasure.

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Lindo v. Belisario.

4th Aug. 1795.
16th Sept. 1795.

It is stated, indeed, that there is a difference of opinion amongst some of their ancient doctors on this point; but the authorities, on which they principally rely, warrant the construction which is here given of the Kedushim and its legal effects. This is the opinion of Rabbi *Isaac Alphassi*, the first of the three chief guides, on whose authority all religious matters are determined. *Maimonides*, who is the second authority, says the same, and also the Jewish doctors, some contemporary, and others subsequent to the said *Alphassi* and *Maimonides*. But *Raburn Ashur*, who is the third of the chief authorities, and the author of *Bèth Joseph*, with some others differ, and say, "that when "a woman will not comply, the man cannot be com- "pelled to divorce her, but merely requested there- "to; but that no coercive measures can be used to "compel her to enter the matrimonial state; for "even a married woman, who should recede from "conjugal rights, would incur no punishment as "for a transgression, but she would lose only her "maintenance, and the dower with which she had "been endowed."

The Bethdin describe the opinion of the leading doctors to be, that the man may be compelled to divorce her,—and I understand them to concur so far as to state their own opinion to be, that the man cannot compel the betrothed woman to surrender her person; but, on the contrary, that she may disavow the engagement, and, on making a public disclaimer, will be released under the authority of the Bethdin.

Most certainly this is a very different account from that which we have received from others, particularly from Mr. *Lyon* and Mr. *Ish Yemene*, who

LINDO v. BELISARIO.

4th Aug. 1795.
16th Sept. 1795.

who both say, "that he has a right to demand his "wife, and call on her to come to his house to be "at his command."

These persons refer to authorities, and so do the Bethdin; and I must suppose them fairly cited, though, I confess, these opposite authorities do not much enlighten me. Mr. *Ish Yemene* goes on to state, "that the woman who rebels against her "husband in conjugal points, is to be proclaimed "on *Saturdays* in the Synagogue, and the Beth-"din ought to admonish her, that if she does not, "within four weeks, submit to her husband's com-"mands, though her dower be very considerable, "it shall be lost, and *that* as well in the case of "the *betrothed* as of the *wife*." *Maimonides* says the same,—"that a betrothed, whose time has "arrived, and does not submit to her husband, is "under the same law which has been described "respecting the wife." Rabbi *Samuel* says, "that "unto the betrothed the Bethdin give thirty days, "and if the relations should prevent the woman "from submitting, the like thirty days will be al-"lowed to them, and, at the expiration of that "time, if the order of the Bethdin is not obeyed, "the punishment of excommunication will be de-"nounced against them."

Another question was, "Whether, after Kedu-"shim, a woman can be divorced, except for such "causes as would be causes of divorce after mar-"riage?" I think the answers all agree in stating, that there is no assignable difference, but that great power is given with respect to divorces in one case as well as in the other.

The sixth question referred to the rights of property; upon which the Bethdin say, "This question

"we

"we must analyse, because it comprizes several "*ideas*; we deem it necessary first to describe what "Hupa is, lest it should be misrepresented. "According to *Maimonides* and the author of the "*Beth Joseph*, this ceremony is—'that the man "brings the woman, whom he has previously be-"trothed, to his house, sets her aside for his special "end, and is united with her.' Which bringing "home appears from the Talmud to be prescribed "to be done in a public and ostensible manner. "This bringing home, however, and this setting "aside and being united with her, is the very "essence of marriage, though it be not solemnized "by the nuptial benediction, nor marriage con-"tract; but it is ordained, that the solemnization "and the Ketuba, or marriage contract, should "precede the marriage, which is never omitted "when things are done in a regular and proper "manner. Some, however, describe the Hupa to "be in the following manner:—The bride and "bridegroom are introduced under a pavilion or "canopy, attended by the relations and friends; "and that the espousal and nuptial benediction "being said, constitute the Hupa. This is the "customary mode used in this country and most "other countries with which we are acquainted. We "are of opinion, that either this or the other mode "will constitute Hupa: the latter, because it is "the one generally adopted, for we greatly revere "customs universally and anciently established; "the former, because it is laid down by the great "*Maimonides* and the author of *Beth Joseph*. "When either of these modes of performing "Hupa has been observed, though consummation "has not passed, the woman is married, provided

LINDO *v.* BELISARIO.

4th *Aug.* 1795. 16th *Sept.* 1795.

"she is in a fit state of receiving connubial em-"braces; otherwise, though she be brought home, "she is but *Arussa*, or *Betrothed*." In another place they say, "As to the relation that the Ke-"tuba, or marriage contract, has with respect to "the marriage fortune,—we must observe, that "nothing is called Ketuba, but what a man binds "himself to give to his wife as a dower; but, "what the woman brings to her husband in mar-"riage, is called *Nedoniah*, *donation*, and the right "of the man in this *donation* entirely depends on "the articles of agreement between the parties, "previous to their entering into the married state. "These articles are either specified in the Ketuba "by reference to another written document made "for the purpose, or they are expressed in the "very Ketuba. But, if previous to entering into "the married state, no stipulation was made, ex-"pressing what right the man should have in the "property which the woman possesses, or becomes "entitled to at her marriage, that property, whether "moveable or immoveable, passes with the woman "in *potestatem viri*, for the husband to enjoy the "produce thereof during his natural life, and if he "survives the wife, continuing her husband 'till "the time of her death, he becomes then master of "the principal. Now since Hupa, as above de-"scribed, constitutes marriage, even without Ke-"tuba or marriage contract, the husband obtains "a right in his wife's property either according to "previous stipulations made for the purpose, or "in the produce thereof, if there be no such "written agreement."

Upon the seventh question they say, "That "having laid it down that the Hupa is the very

 "essence

"essence of marriage, consequently a woman so "married, though there be no Ketuba, is entitled "to a stated dowry of fifty shekels, if a virgin, or "twenty-five shekels if otherwise, this being one "of the ten rights that she can claim of her hus- "band, whether he bound himself to fulfil them "by a written contract or not."

With respect to any question of property, I think it was proved by the general evidence that the rights of property did not necessarily follow the Ketuba. The doubt then was, whether there might be a right to the person of the wife, though not to her property, which might constitute the *vinculum matrimonii*, and give him a right to call upon his wife to fulfil it, either by his own authority, or by resort to the Jewish tribunal which has jurisdiction in matters of this kind.

Upon this important point there is a difference of opinion, and great opposition between the witnesses. There is, on one side, the Bethdin positively asserting that the man has no power of his own, nor any power to call in the authority of the Bethdin for that purpose; but that he is compellable to give up the contract, if the wife persists in her aversion to it: On the other hand, there is the opinion of private Rabbies, that it is otherwise. Under this difference of opinion on a point which goes to the very root of the question, how is the Court to decide, and to which authority is it to adhere?

It is to be observed, that the Bethdin is the tribunal which administers the law, on questions of this nature, as it exists in this country, and therefore must be presumed to understand it. It is very possible that the Jewish law may, like other

 systems

LINDO v. BELISARIO.

4th *Aug.* 1795. 16th *Sept.* 1795.

systems of law, receive different modifications by the particular laws of different communities. There are principles of marriage law generally prevailing in *Europe;* but the canon law subsists under very different modifications in different countries, according as the different institutions of the countries in which it is received operate upon it. If I am to enquire into the operation of a foreign law, I must look not to the more general ceremonies, but to those of the particular countries respectively.

It appears that Mr. *Ish Yemene* has been a professor of Jewish law at *Hamburgh:* It is possible, therefore, that he may speak according to the particular modifications of the Jewish law in that country, or it may be that there are certain modifications of the Jewish law in this country which are best known to those who are in the habit of administering it here.

Supposing therefore, that the attainments of knowledge are equal in the individuals, I think the balance of the authority must incline to those who are the professors of the law as it is administered in this country. I must consider also, that the opinion of the Bethdin is a judicial opinion, and not merely the opinion of an individual, the weight of which travels no further than the reputation of his own personal attainments. It is an authoritative opinion, which not only conveys knowledge, but is also sanctioned by the qualifications of probity, learning, judgment, and discretion, which must be presumed to have recommended the individuals to the judicial situations, which are entrusted to them.

The Bethdin say, as I think I should, that this is a contract absolutely determinable at the will of the

LINDO *v.* BELISARIO.

4th *Aug.* 1795.
16th *Sept.* 1795.

the woman; that, if called upon by Mr. *Belisario* to fulfil the engagement, she has nothing to do, but to say that she detests him, and does not choose to continue his partner. If that is so, I should have great difficulty in saying that there is an absolute vinculum subsisting between them; I must therefore pronounce, if this information is correct, that he has no right to consider himself as entitled to the character of husband.

It is possible there may be an error in the determination. I am sensible of the extreme difficulty which is to be encountered upon a subject so far out of the reach of the ordinary studies of this profession. But it is my comfort that, if there is error, it is not mine. It lies with those who have given this information—who are bound to give it conscientiously, and I am bound conscientiously to receive it. If I was to determine the question of marriage on principles different from the established authorities amongst the Jews, as now certified, I should be unhinging every institution; and taking upon myself the responsibility, as Ecclesiastical Judge, in opposition to those who possess a more natural right to determine on questions of this kind. On these grounds I am of opinion that Mr. *Belisario* has not proved his case, and that *Esther Lindo* is not to be considered as his wife.—The words of the decree must be simply—*that she is not the wife of Aaron Mendes Belisario.*

Affirmed, on Appeal, by the Judgment of the Court of Arches, which is printed in the Appendix with some additional papers, as further elucidatory of the general subject of this case.

HODGKINSON, FALSELY CALLED WILKIE, v. WILKIE.

4th *Aug.* 1795.
In nullity, by *reason of minority*, and *want of consent*,—what consent required. Consent, once given, *how* to be retracted.

THIS was a case of nullity of marriage, on the part of the wife, by reason of her minority, and the want of consent of her mother.

JUDGMENT.

Sir *William Scott*.—This is a case in which there has been a very considerable quantity of evidence adduced, and much argument bestowed, and That on the authority of parents to give consent, which is not very applicable to the case. Looking only at the bulk of the depositions, it might be considered as a case of difficulty; but the real point is very clear, and lies within a very narrow compass. The suit is brought by Miss *Hodgkinson* to annul her own marriage, under the provisions of the Marriage Act, which is made, I will not say in derogation of the liberty of marriage, but as a restriction upon it. As such, it has always been held right that it should be strictly construed. It is enacted, that the marriage of Minors, celebrated without consent of parents or guardians, as specified in the Act, should be invalid *. All the circumstances, however, on which

* The consent of parents to the marriage of children, *in patria potestate*, was required by the Roman law. "Nuptiæ consistere "non possunt nisi consentiunt omnes, id est qui coeunt—quorum-"que in potestate sunt." Dig. lib. 23. tit. 2. § 2. Cod. 5. tit. 8. § 2. 5." The early councils and canons of the Church of *Rome* strongly upheld the same principle. But it was relaxed by the Council of *Trent*,

which that conclusion depends, must be fully proved. The *onus probandi* lies on the party suing to annul the marriage, who must prove clearly not only the minority, but also the want of the requisite consent. In the present case, both questions arise. It appears that the Husband is an Apothecary of the Dispensary at *Newcastle*, and that the Wife is the Daughter of an Exciseman of that place. It is clearly shewn, that *Wilkie* was very intimate with the Father during his life, and, after his death, with the Widow and her Daughter, who received many kindnesses and much assistance from him. This fact derogates in no inconsiderable degree from the testimony of the Mother, who has taken on herself to deny it, though it is incontestibly proved to the perfect satisfaction of the Court. It is admitted, because it could not be denied, that the connexion commenced with the entire approbation of the Mother; that Mr. *Wilkie* was considered as her intended son-in-law; and that she expressed not only approbation but anxiety that it should take place at an early period. At last It did take place, by virtue of a licence obtained on the oath of the Husband, in which he swears that the young woman is of age;—there is no appearance of any consent on the face of that instrument. It is admitted, that she wanted only seventeen days of being of full age, and there is

Trent, sess. 24. and not considered to constitute nullity. *Pothier*, tit. Mar: part 4. ch. 1. sec. 2. See also Bishop *Taylor* on the Power of Fathers, 14 vol. 201.

The Reformatio Legum, art. 4. *de Matrimonio*, adopted the principle of nullity. But it was never actually established in this country, till the st. 26 Geo. 2. c. 33. according to the restrictions therein contained.

 nothing

HODGKINSON v. WILKIE.

4th *Aug.* 1795.

nothing that shews whether that fact was known to the Husband or not; though it may reasonably be presumed, that, as the time of full age was so nearly approaching when the licence was taken out, he would not have incurred the guilt of perjury for any such object, when he knew, or had reason to think that he had the full consent of the Mother. It is not contended that any particular dissent was then signified; and it is proved, that the Mother was in the habit of throwing out, in conversation, that her daughter was of age: there is therefore reason to suppose that he really thought so.

It is true, however, that, if the fact is clearly proved, the Court can make no exception on that account, as It is merely ministerial in declaring the result. In a case so clearly proved, I shall abstain from going through all the evidence on that point, since I shall consider the question of consent first;—if that is established, all other considerations will be superfluous. On that part of the case I think the evidence is sufficient. The mother has been examined;—it appears that she is a reluctant witness, and has deposed, nearly in the terms of the allegation, "that she did not give consent to this "marriage." That the parent is a material witness is not to be denied; and the Court will always pay due attention to such evidence; but it must attend, at the same time, to all circumstances relating to the credibility of the evidence; to the probability of the circumstances stated, the credit of the person, and the degree of support or confirmation that it may receive from the testimony of others.

As to the conduct of the party, if the question depended merely on that, there is strong evidence that

that her heart and mind went along with this connexion. The man lived on terms of intimacy and friendship with her; was admitted into her family, with every encouragement to his addresses; so that, if there was any *dissatisfaction* entertained, it must have been upon a very sudden change. It is undoubtedly true, that consent may be retracted; since the parental authority continues up to the time of marriage. This principle, however, must be taken with reasonable limitations; for it cannot be maintained that this power can be arbitrarily resumed at any moment: that if a parent gives consent on *Monday* for a marriage the next day, and it is deferred, it would be necessary to renew that consent, or that it would be considered as wearing out or expiring by mere lapse of a short time. When consent has actually been given, it will be necessary that dissent afterwards should be distinctly expressed, and that it should be proved so to have been in the clearest manner; for it would be a most alarming circumstance, if, from mere brooding dissatisfaction in the mind, not expressed, the validity of a marriage to which consent had once been given, could be attacked.

These are the observations which I think myself justified in making on the probability of the transaction. On the credit of the witness herself, I feel the weight of the observations which have been made; for I am satisfied, that she has not deposed with that regard to impartiality and truth, which are necessary to place her before the Court, in the character of a pure witness. Then taking the evidence in this view of its own improbability, and the credit of the witness, I am next to inquire how it is affected by the other evidence in the cause. There is

HODGKINSON v. WILKIE.

4th *Aug.* 1795.

is a great concurrence of evidence, which proves not only her approbation, but the anxiety which she expressed on the subject, and that up to the very moment of the fact of marriage. These witnesses prove the expressions of satisfaction by the mother, both immediately before and immediately after the ceremony.

The witness *Scape* says, "that about a fortnight "before the marriage, the mother requested himself "and his wife to intercede with the daughter to "marry *Wilkie*, and expressed her disapprobation "of her conduct, in giving encouragement to "another person; that about three or four days "before the marriage, he informed her that it was "to take place, and that she expressed her satisfac-"tion at it, and said 'that it ought to have taken "place long before.'" It appears, therefore, that she was informed of the place, of the time, and of the person by whom the ceremony was to be performed, and that she signified her approbation at the approaching event. Then what was her conduct immediately after the ceremony? She drank to her son and daughter, wished them health and happiness, and thanked the witness and his wife for the trouble which they had had. Mrs. *Scape*, if her testimony is to be credited, and I see no ground of imputation, confirms her husband. She deposes, that "about a week before the marriage, the "mother said, that Mr. *Wilkie* was ill, and that "she believed he was made worse by the en-"couragement which her daughter gave to an-"other person; that she desired her to go to her "daughter, and hear what she had to say for her-"self, for she was desirous that she should be "married, and the sooner the better. She said,

"that

" that her daughter would not be married at *New-* " *castle*, but at some distant place; and added, " that if it could not be at *Newcastle*, it could not " be any where better than at *Ovingham*; that the " mother asked when the marriage was to be? and " that the daughter told her the day."

By what sophistry the mother has imposed on her own mind, is to be collected, I think, in another part of the evidence. She seems to have thought that the requisite consent was a formal act, and that it must be in writing; since she told her eldest son, that, though she had given her consent, it was not in writing, and no one could prove it. She told Dr. *Clarke*, also, that neither *Wilkie* nor her daughter had ever asked her consent, meaning clearly a formal consent; but that if they had asked, she should have given it. Then how can the Court adopt the suggestion of any change of purpose? I feel that it would be perfectly unnecessary, and that it would be oppressing and encumbering a single fact by an unmerciful accumulation of evidence, if I was to go through the depositions of other witnesses, who prove a conduct totally contradictory to the case set up. I think there was clearly such consent as is sufficient to establish the marriage; and that if I was to pronounce otherwise, I should invalidate every marriage, in which there had not been a formal and written consent.

It will be unnecessary to consider whether the young woman was a minor or not; I will therefore content myself with saying, that if the consent is proved, as I think it is, the minority is not proved on the evidence adduced—opposed, as it is, to the

contrary

HODGKINSON v. WILKIE.

4th Aug. 1795.

contrary declarations as to the time of birth. On every part of the case, then, I am of opinion that there is a fatal defect—on the point of consent-by opposite evidence; and on the minority, in the insufficiency of proof, which would restrain the Court from pronouncing a sentence of nullity on such evidence.

The Court is bound, I think, to say a word or two on the conduct of the cause, which it would not be decorous to pass over. There has been a most unwarrantable attempt to obtain evidence by purchase, which calls for more than mere censure. I hold it to be my duty to reserve it for further consideration, whether an application should not be made to some other Court to correct an attempt of this nature, which is highly derogatory to the administration of justice, and what, if passed over with even verbal censure, may draw upon this Court imputations unfavourable to the purity of its proceedings.

I think the wife has failed in her proof, and likewise in her duty; and I can only hope, that it has been by some unhappy mistake alone, that she has been led to attack a marriage bond, which the laws, and the religion of the country, hold to be perfectly valid; and that she will see the necessity of returning to her duty under the connexion which she has formed.

ELWES *v.* ELWES.

THIS was a case of divorce, by reason of the adultery of the wife, in which the merits of the case, and the objections arising on the evidence, are discussed at length by the Court.

July 13th, 1796.

Divorce by reason of Adultery of the Wife, decreed.—Objections to the evidence overruled.

JUDGMENT.

Sir *William Scott*.—This is a proceeding for a separation, by reason of adultery, instituted by *John Elwes*, Esq. against his wife. The marriage took place in 1789, the parties cohabited together, as it should appear, upon terms of matrimonial affection, at least during the latter part of their joint residence, until *September* 1793, when cohabitation ceased. It was some time after that the cause commenced in this Court. Various pleas have been given in—a libel on the part of the complainant: A defensive plea on the part of Mrs. *Elwes*, a plea stating a verdict which has been obtained in an action at common law, two pleas exceptive to the credit of witnesses on each side, and one allegation restrictive of the credit of one witness, examined on the part of Mrs. *Elwes*, whose credit had been impeached.

The pleas have been thus numerous; many witnesses have been examined; and the cause has been argued with much zeal and industry. The Court has been called upon, by more than one admonition, to apply much caution in the determination of this cause. I hope and trust, that the opinions which I have occasion to deliver in cases of this kind, are in general formed with due deliberation,

ELWES v. ELWES.

13th *July* 1796.

and a sufficient attention to the obligations of that office which I happen to fill. Having said this, I must add, that in very few cases have I had less hesitation and fluctuation of opinion, than in the present. It appears to me, that the real merits of the question reside in few particulars, and that these particulars are not liable to much serious doubt or nice observation, and that they lead to a conclusion which resides at no great distance from such premises. There are many parts of the case which unquestionably are pretty remote, but those parts, perhaps, I shall not find it necessary to travel into with any minute exactness. The persons, with whom Mrs. *Elwes* stands charged, are two, a Mr. *Egerton*, and a Mr. *Harvey*, persons, it should seem, bred to the law, living in different law societies. There are several articles of the libel, given on the part of Mr. *Elwes*, which state the commencement and progress of the acquaintance which this lady had with these two persons from the year 1791, and which lasted with much general, and, it is contended, with much suspicious familiarity, till the time when he separated from his wife. The latter parts of the libel state, what in our technical language are called approximate facts, or facts from which the legal conclusion of adultery is immediately deducible.

Upon this libel four persons have been examined, and the whole support of the accusation is comprized within their testimony; for if they do not prove sufficient, there is an end of the charge, nothing farther arises; on the other hand, if they prove sufficient, they will establish the legal conclusion, unless the legal effect of their testimony is taken off by something which either destroys it directly

directly by contradiction, or which depreciates it by diminution of the credit of these witnesses, or defeats it indirectly by the opposition of other facts, consistent with these in point of truth, but leading to a different legal conclusion; such as a connivance, and still more an active seduction on the part of the husband, before the injury was committed, or a condonation of it, after it came to his knowledge. Three of the witnesses are examined to general familiarities and specific facts; one to general familiarity only.

It has been truly observed that the libel goes a considerable way beyond the proofs; facts are charged which can hardly be said to be proved at all in the manner they are stated in the libel; and there are other facts which, upon the evidence, turn out to be slight and insignificant. Having said this, I may add it is no more than may be said in almost every case of this nature. The complainant states his case from information and report, and in these matters, of mere general circumstance and habit, there is much room for misapprehension, and for over-coloured description. It is a matter of daily observation in such cases, that circumstances find their way into the libel, which, upon further examination, do not carry with them much serious importance; but it is a different question, whether there is not sufficient proved, upon this head, to excite the alarm of the Court, and to prepare it for the reception of evidence that may be more directly demonstrative of guilt. The general evidence, I think, has that effect; and I state the result of it without exaggeration, when I say that, to my mind, the following particulars seem to be sufficiently established. That Mrs. *Elwes*, a married lady,

ELWES *v.* ELWES.

13th *July* 1796.

lady, did admit these two young men to her society, in a manner that is not free from suspicion and censure. They were not absolutely unknown to her husband, but they had no intimate acquaintance with him; they were rarely in his company; their society was never cultivated in any degree by him, nor was it in any manner recommended by him to his wife. However, in his absence, they visited her with great frequency and familiarity: it appears that they were each of them separate and alone with her in the absence of the husband; that they breakfasted and dined with her alone; that she occasionally called upon them in their Chambers; and that, when she met them in the street, she got out of her carriage, and ordered it to wait, or dismissed it entirely, and continued to walk with them; that she rode out with them, and they waited for her at the end of the street, and that she ordered her servants to conceal from her husband their having been in her society; that she paid the turnpikes herself, or ordered them to be paid, in order to carry on the deception; in short, that she passed much of her time with them, not only unknown to her husband, but with an anxiety that it should continue *unknown* to him, and with a degree of secrecy and clandestinity respecting him, which, if it is not criminal in itself, is so closely connected with such habits, as to give a high degree of credibility to any thing more grossly criminal, that is stated to be the result.

Having taken this general view of the evidence of the sort of familiarity which subsisted between these gentlemen and this lady, I cannot but think that it goes much beyond those limits which even the forms of the world allow in such cases; and

if

if a wife will form connections of this nature, and will cultivate them in this manner, I cannot think she has much right to complain of the want of candour in her husband, or in the world, if suspicions are entertained extremely to her disadvantage. With respect to the freedom regarding these gentlemen, which I think no man can state to be consistent with the duties of sincerity towards the husband, and with those duties of caution and prudence with respect to other men, which the character of a wife, even in the most relaxed apprehensions, impose upon a married woman,—enough is proved, in this stage of the case, to render highly credible any evidence of a more substantive nature which I may find in the progress of the cause. Some contradictions have been attempted to be pointed out in the evidence; but they are not of that nature which in any degree destroy the proper harmony of the witnesses.

The evidence is comprised in the examinations taken upon five articles of the libel: I shall only state particularly those which are supported by concurrent testimony. The eleventh, which stands upon the single evidence of *Collicott*, and in which an anachronism has been pointed out, is to this effect: "That one evening, about seven o'clock, "towards the end of the year 1792, as he was over "the stables belonging to his master's house, he "looked through the window into the back par-"lour, and he then saw, by the light of a candle, "*Sarah Elwes* and Mr. *Egerton* alone together in "the said room; that he saw Mr. *Egerton* kiss his "mistress several times, and take other indecent "familiarities with her; that he continued look-"ing at them for about five minutes, and then

 "went

Elwes v. Elwes.

13th *July* 1796.

"went away." The next article stands likewise upon his single testimony; for he says, "about "five in the evening of the 18th of *August* 1794, "he went up into the same room over the stables, "and that he very plainly saw Mr. *Harvey* sitting "upon a sopha in the room, and his mistress sitting "in a chair close to him, leaning her head towards "him, and that *apparently* she kissed him several "times: he mentions several other acts of gross "familiarity; that he continued his observations, "and saw Mr. *Harvey* and his mistress close to-"gether on the sopha; that she kissed him several "times, and that they continued upon the sopha "for some minutes." I suppose, on this evidence, I need say no more than that, if it is credited, the facts are of a nature from whence the legal presumption of adultery may be inferred.

My observation, however, ought particularly to be directed to those facts on which I have the benefit of concurrent testimony, viz., on the thirteenth, fourteenth, and fifteenth articles of the libel. Upon the thirteenth article *Collicott* deposes, that "on the 21st of *August* 1793, in the morning, "as he thinks, suspecting that there was some-"body with his mistress, he went up into the "room over the stables, and saw Mr. *Harvey* and "his mistress sitting close together on the sopha; "he saw them kiss each other several times, and "his mistress sit on Mr. *Harvey's* knee; that he "continued looking at them for about twenty "minutes; and after quitting the place for some "minutes, he returned again, and saw them still "in the same room alone together," when he saw a great deal more familiarity, which it is not necessary for me to repeat. This witness is supported

ported by the testimony of *John Taylor* upon this article, and he deposes, that "on that day of the "month of *August*, as he was in the stables, he "was called up stairs by the groom," a circumstance which is adverted to by the other witness; "that he then saw Mr. *Harvey* and Mrs. *Elwes* "together alone in the drawing-room, and Mr. "*Harvey* lying on the sopha therein, and Mrs. "*Elwes* sitting in a chair close to him; that he "saw them kiss each other, and Mr. *Harvey* laid "his hand upon her neck; that being under the "necessity of getting his carriage ready, he went "away."

Now, with respect to the contradictions that counsel have endeavoured to point out in this evidence, it has been urged that one of the witnesses states, that it was, as he best recollects, in the morning; the other, that it was in the evening; but I think both these witnesses may speak true, speaking at this distance of time, and with a want of precision which they both avow. The difference, in that respect, will not materially affect the substance of their testimony. It is said, that *Taylor* was not there on the second occasion. *Taylor* is certainly not examined upon that article of the libel, though he is vouched as being present; whether there is a mistake in that respect, I do not know; but I am satisfied upon the evidence that they were present at one of the times stated in one of these articles in society together, and that they did see what they jointly depose.

The 14th article states a subsequent fact to have passed when *Collicott* and *Taylor* were together, to which the former deposes, that "on the 2d of "*September*, being in the stables, he went up stairs,

ELWES v. ELWES.

13th *July* 1796.

* "and plainly saw his mistress sitting upon a gentle-"man's knee on a sopha, and saw him kiss her "several times, and pull her about, and take other "freedoms with her; that he called up his fellow "witness, *John Taylor*, and a Mr. *Wild*, and that "they all saw the familiarities described." *John Taylor* is examined upon this article, and deposes, "that he looked into the same room, which is the "back drawing-room, that he there saw them alone "together, that he saw them kiss each other several "times, and Mr. *Egerton* take Mrs. *Elwes* round "the waist, and that after being some minutes "together, they went out of the room."

It was observed, that the facts, to which these witnesses depose, are not precisely and identically the same; that the situation and attitudes of the parties, as related by one of the witnesses, are different as related by the other. It seems a sufficient answer to that to observe, that the parties were a considerable time together; that the observations were made at different intervals, and that all the attitudes spoken of are *ejusdem generis*, and such as lead to a conclusion, that the facts followed, to which such gross familiarities are natural preludes: The variations are no other than may be expected to take place in such an interview. The last criminal fact is stated on the fifteenth article, which is deposed to by *Collicott*, supported by another witness of the name of *Lings*. He says, "that, on the 15th of *September*, Mr. "*Elwes* set off in his carriage for his country "house, leaving his wife then ill in bed; that about "ten minutes after his master was gone, *Elizabeth* "*Plumb* went out, and remained for about ten "minutes, and that half an hour afterwards, he

"being in the street, saw Mr. *Harvey* come to the "door, who was let in by some person, without "either ringing the bell or knocking; that he went "to the room over the stables, and from this "station his observations were of a similar nature "to those already noticed by the Court." In corroboration of this, *Ann Lings* is examined, and deposes, "that between twelve and one o'clock "on *Sunday* the 15th of *September*, her master set "off from his house in *London*; that *Williams* went "out of the house and returned; that witness "went into the stables, being called by *Collicott*; "that she saw very plainly Mr. *Harvey* and her "mistress sitting alone in the room close to each "other, Mr. *Harvey* having his hand either round "her waist or neck, and saw those familiarities pass "between them repeatedly."

Now, looking at this evidence of *Collicott* and *Taylor*, and admitting the possibility of a mistake, in one of those witnesses, with respect to the time of day and evidence, I should surely carry that caution, which has been so strongly recommended to me, to a degree of absurd and unreasonable scrupulosity, if I did not conceive that they necessarily drew with them the conclusion that these parties were living in a criminal intercourse with each other. I suppose, no man, who hears this evidence stated, and gives credit to it, can think that I ought to stop short where the witnesses stop, and not go the length of supposing that something passed, which the witnesses have not literally described. Upon the effect of the evidence no sufficient question can be raised. Two exceptions, however, have been taken to its sufficiency:

 First,

Elwes v. Elwes.

13th July 1796.

First, that the witnesses themselves do not go the length of venturing to state, that the criminal fact did take place. Secondly, that a witness is vouched, as having been present upon several of these occasions, a Mr. *Wild*, who has not been examined in the cause.

With respect to the first objection, I take it to be a position perfectly new, that the Court is bound by the defective apprehension of the witnesses. It is the business of the witnesses to relate facts and not to draw inferences: that is the business of the Court; and it would be a monstrous proposition indeed to assert, that the merits of a case of this nature, are to depend, not upon the narrative, but upon the logic of the witnesses. Undoubtedly the libel must plead the conclusion of adultery, because unless it is pleaded, *non constat* that it may not be an action for mere *solicitation of chastity*. But if the party does aver it, and he proves only proximate acts, he proves unquestionably the whole of his averment in the libel.—If a witness stops short, and declines or omits to state his belief of the ultimate consummation of the act, it is very true that the Court is put upon its guard to see whether there is any ground for a scepticism of that nature: but if the Court sees that the facts are of such a nature, as will justifiably, and almost necessarily, lead to the conclusion; the scepticism of the witness, even if it really exists, signifies nothing. The Court, representing the law, draws that inference which the proximate acts unavoidably lead to; and therefore if the witnesses, even in this case, hesitated and paused about drawing that conclusion, I should not conceive myself in any degree limited by their hesi-

hesitation upon that subject. * The fact however is this, the witnesses are not examined at all as to their belief: An interrogatory is simply put to them, whether they will take upon themselves to swear positively that the fact of adultery has been committed? They conceiving, I presume, that they were bound to speak to their observation, and not to their belief, have, in answer to that question, simply deposed—that they cannot take upon themselves positively to swear that the fact of adultery had been committed; meaning thereby nothing

* The nature of the evidence, on which cases of this description have been universally considered, is stated by Commentators in the following terms:—Et ratio est, quia, cum adulterium sit ex illis criminibus, quæ in abdito loco & omnino occulto admittuntur, est difficillimum probare, nec vere probari potest, sed ex probationibus petitis et presumptionibus concluditur. Unde fit, ut non tam exactæ probationes petendæ sunt, ac in aliis criminibus, quæ oculis patent, palamque perpetrantur.

Sed non sufficit quæcumque suspicio probabilis, sed desideratur *suspicio violenta*, quia hæc sufficit ad condemnandum. Est tamen cognitum certitudine morali, et ex urgenti præsumptione, quæ virum prudentissimum ad judicandum adulterium induceret. *Sanchez*, lib. x. disp. 12. p. 374.

Est siquidem fornicatio et adulterium de genere horum delictorum quæ clam et abditè solent perpetrari, ut vix de iis certo constare vel probatio eorum indubitata adduci queat—Quare in occultis ejusmodi delictis probatio conjectura pro concludenti habetur—Neque criminis certitudo alia requiritur quam quæ haberi potest. *Carpzovius*, Definit. Eccl. lib. ii. tit. 12. Def. 209.

Non enim potest verè dici fœminam adulterii ream esse ex sola suspicione, ita ut suspicio illa pro crimine adsumatur; bene tamen pro judicio et argumento adulterii, ex quo vehementer suspecta sit, eaque suspicio violenter, arbitrio boni viri, vel indubitata existimetur. Ex his vero præsumptionibus, quandoque fertur in civilibus diffinitiva et ordinaria sententia quandoque etiam in criminalibus. *Covaruvias*, tom. i. p. 197.

ELWES *v.* ELWES.

13th *July* 1796.

more than this, that no fact of that kind had passed under the observations that they had the opportunity of making.

The other objection is, that a third witness is vouched, who is not produced and examined in the cause.—In the first place, it is by no means necessary that every person, who was present at a transaction, should be produced by the party who prefers the charge: Even the cautious jealousy of our law establishes facts of this kind by the testimony of two witnesses at the utmost. That there could be any intention to dissemble the presence of this witness, or to withdraw him from the knowledge of the Court, cannot be suggested; because he is vouched, by name, by the witnesses who are examined; and I cannot help thinking that it is an observation, which does not merit to be treated with that degree of slight which was thrown upon it, that it was perfectly within the power of the other party to have produced this witness, in support of their allegation of a conspiracy,—seeing that this witness was present at the transaction,—seeing, that he is so described to be in the presence of these witnesses,—seeing, that if these transactions did not pass, in the manner they have described, that Mr. *Wild* could have given a most effectual contradiction; for although I admit that originally it was not necessary, nor in any degree proper, that this witness, *Wild*, should have been produced on the part of the defendant, yet in these circumstances I cannot but feel, that there was every call of propriety and prudence, if they are sincere in the belief that these transactions did not pass in the way they are stated, to produce Mr. *Wild* for the purpose of giving that contradiction. To say that it

it would be giving the other party the benefit of a cross examination is, in other words, in my apprehension to say only this,—that there was reason to be afraid of the possible disclosure of the whole case; because, if the case was what they state, that this was mere fabrication and conspiracy, to be sure nothing which *Wild* could depose, either *in chief*, or upon interrogatories, could be attended with any considerable degree of hazard.

ELWES *v.* ELWES.

13th *July* 1796.

I am of opinion therefore that there is no ground, in point of law, to object to the sufficiency of evidence. These witnesses depose with satisfactory precision as to time; they depose with sufficient harmony with respect to circumstances, and the effect of their testimony is complete. I am of opinion then, that unless there are objections to the sufficiency of the witnesses themselves, the evidence cannot be pronounced to be, in any view of it, deficient. Now is there, or is there not, any ground, in point of fact, upon which reasonable objections can be constructed to the sufficiency of these witnesses? If such objections exist, they must arise either out of their general character, or out of their depositions, or from their conduct on this particular transaction.

With respect to the general character of the witnesses in this case I must observe, that they are all three of them totally unimpeached: they stand before the Court with reputations undiminished in point of general credit; and, upon those grounds are entitled to a favourable reception, as any witness who appears in any Court whatever. To two of these witnesses, *Taylor* and *Lings*, nothing is imputed, as affecting their general character; and nothing arises from the other two sources of possible

ELWES v. ELWES.

13th July 1796.

ble discredit, either from their depositions, or their particular conduct in this transaction; for, as to the declaration, made by *Collicott*, respecting himself and *Taylor*, supposing that declaration to be established, it may be very good evidence to affect himself, but can in no degree, and by no fairness of conclusion, in any manner, implicate the other.

The only person then to whom attention has been called, in the way of an unfavourable attack upon the weight of his testimony, is the witness *Collicott*, and to his evidence various exceptions have been taken. It is said that he deposes very strongly *in chief*, but that much of the force and effect of his deposition is invalidated by concessions and retractations upon the interrogatories. Now, looking at the evidence which he has given in these two different forms, I am not by any means prepared to say, that he has deposed in a malignant and an uncandid manner. It is very true, that, upon the libel, he omits some circumstances which are stated upon the interrogatories; but this is no more than happens, and usually happens, according to the mode in which our examinations are taken. The attention of the witness is naturally elicited by the circumstances stated in the allegation; to these he adverts, and frequently neglects or declines travelling into other occurrences than those particularly stated — but that these circumstances were dissembled with any malignant intent, I cannot believe; because he expressly disclaims, in the history which he gives of the behaviour of the parties towards each other, upon these occasions, observations of any thing indecent or immodest. He says that he did not, at these particular times, see any thing inconsistent with the duty of Mrs. *Elwes*.

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The second objection is undoubtedly of a more forcible nature, that he has made declarations of a very alarming sort; that he has declared, that he would bear testimony against his mistress for the purpose of ruining her; that he had received, or been promised to receive, a considerable bribe for this purpose; that he was actuated by motives of malignity, as well as interest, nay, that he complained of her want of generosity: that, if she had acted in a different manner towards him, he would have been ready to give a very different testimony. Now I cannot, in my place, but notice that this evidence has been very unfairly introduced. The allegation was admitted upon the express ground, that these declarations had been made subsequent to the institution of this suit. If they had *not* been so made, unquestionably they ought to have been pleaded before, because they are matters not so directly arising out of his deposition, as they are destructive of his general credit. It was perfectly within the knowledge of one of the parties that this man was to be produced, and to what articles he was to be examined; and if he made these declarations within the knowledge of the person proceeded against, surely the consequence ought to have been that she should have pleaded these facts before, and not have waited till after publication of this matter; it being of that nature, which, in its general effect, is constantly and properly so pleaded.

It was more incumbent in this case that this allegation should have been given at that time, because it connects itself with the suggestion of a conspiracy. It is pleaded, in the defensive allegation,

ELWES v. ELWES.

13th *July* 1796.

tion of Mrs. *Elwes*, that the whole of this charge is a malignant fabrication; it would then again have corresponded with her general course of defence, and fortified and proved, in the strongest manner, the general plea, that the whole of the evidence was the fruit and result of this wicked combination. However, the fact is, that it is not produced until long after the publication of the evidence. When I look at the witnesses, who are examined in support of it, I find that *Plumb*, and another witness, expressly state that the fact was known to them, of these declarations being made, long before the institution of the suit. The declarations were made at the time they lived together in the service of the parties. The other witness, *Dowling*, speaks in a similar manner with respect to most of the declarations; but, she says, "that she does not know, whether, "before the examination of *Collicott*, in the action "at common law, or in this case, he did declare, "though she thinks it was since the separation, at her "own lodgings, that he knew no harm of his mis- "tress, and that if she had been generous, he would "not have troubled his head about the matter."

Then all the declarations that are, in any manner, proved to have been subsequent to this suit, are proved in the loosest way,—merely common declarations that he said "he knew no harm of his "mistress, and that if she had been generous, he "would not have interfered in it." In the first place, it is to be observed he has been interrogated, and he admits that he did say this, "that if his "mistress had treated her servants with kindness, "they would probably not have troubled their heads "about the matter." Now, it is not at all unlikely

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that this declaration, which is very far short of the other, might, in the apprehension of the witness, have been mistaken for it, and that he had said,— "that he should not have entered into the business "at all, if his mistress had conducted herself, in "the usual manner, towards her servants."

The next declaration,—that he knew no harm of her, he positively disclaims, and swears he never did, upon any occasion, make a declaration to that effect. Then I have the oath of one witness against the oath of the other. It is credit against credit, and it is for me to determine, whether, upon the single credit of this witness, I am to pronounce that this man has contradicted that deposition which he has given most solemnly upon his oath. The remaining declarations, which are stated, are certainly of a very malignant and of a very alarming aspect. But if I look either to the substance of the declarations, or all the conduct of the parties respecting them, it is quite incredible that such should have been made. He is first represented to have stated, that he came into the service of the family without a character: The direct contrary of this is proved in the most complete manner; and that he had a character, is sustained by the declaration of his former master. Why should a man discredit himself, by a falsehood of this species; or why should he represent himself coming without recommendation, when he came with the usual recommendation of a servant? That he should misrepresent himself, and vilify his own history, must be thought a little extraordinary, and an unnatural circumstance.

Next, with respect to these declarations, let me look at the conduct of the parties, and, first, to the conduct

ELWES *v.* ELWES.

13th *July* 1796.

conduct of this man;—that he should, in a public and unreserved manner, relative to the history of a suit, which was at that time pending, or likely to be instituted in a court of law, state himself to be a person guilty of the most malignant and corrupt falsehoods; that he should put it in the power of every person, who heard these declarations, to counteract them; that he should do all this, is, upon the face of it, not consistent with the common course of human behaviour.

On the other hand let me view the conduct of the parties to whom these conversations are addressed;—and particularly of Mrs. *Plumb*,—a person to whom I suppose I do no injury, when I state, that she bears a very high degree of attachment to all the interests of her mistress; that she has all the zeal, that a favourite servant may be supposed to have, for the reputation of that mistress; and that she has the same regard for common justice which the human mind, not warped by any selfish interest at that time acting upon it, naturally feels. This woman and the other witnesses associated with her, hear these declarations repeatedly made to the disadvantage of a lady, whom they know to be innocent; and, in whose cause, they feel all that animation which particular attachment as well as general justice inspires. They hear all this, and yet keep it a secret totally locked up in their own breasts, and make no communication of it to the party, who might have been most effectually benefited. And although it was perfectly known, that this man was to be considered as the cardinal witness in support of this prosecution, no communication is made to their mistress that his testimony was capable of being effectually destroyed. It remains locked

locked up, an idle and insignificant secret, in the breasts of those three individuals, never communicated till in a very late stage of this suit. I am called on, then, to decide between the conduct of Mrs. *Plumb*, and the testimony of Mrs. *Plumb*, and I have no difficulty in deciding to which I shall adhere. I am of opinion, that these declarations could not have passed in the manner in which she has described them.

But, it is said, that all this may be a conspiracy; and how is the innocence of persons to be protected against the danger of such a conspiracy.—A conspiracy, however, is not to be presumed upon the ground of mere possibility. If witnesses come unimpeached in point of general integrity, if they depose with characters of fairness in their particular narrations, the facts must be received, or there is an end of all judicial inquiry. Human prudence has done its utmost, has done all, that it is capable of doing, in giving every security that can be afforded to individuals. Still it is asserted, here is direct evidence of the fact of a conspiracy.

Now, who are the conspirators in this case? If the facts are established, upon the evidence of witnesses, upon whom no such taint of conspiracy lies,—it perhaps would not signify very much, even if it could be shewn, by any probability, that a conspiracy existed any where else. But what are the proofs upon which the existence of this conspiracy is affirmed? Why, it amounts to this, Mr. *Elwes* was dissatisfied with the conduct of his wife, and expressed his determination to dismiss her in terms strong and intemperate. Possibly this may be true to some extent, and it is not unnatural that he should have felt so, if the behaviour

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ELWES v. ELWES.

13th July 1796.

of his wife was that, which the conclusion, to be deduced from the evidence in this case leads me to decide it was; it is not, I say, unnatural that he should feel a great disinclination to the society of his wife, and express it in forcible, and, perhaps, in unmeasured terms. But that he acted upon those ideas and declarations in any manner towards the corruption of his wife has not I think been seriously argued. It has been said there is some evidence of subornation of witnesses. The only witness produced to prove it, stands contradicted on the evidence of Mr. *Haywood*, and looking at the conduct of the witness *Gray*, and the description he has given of himself in the business, I think I should pay a very ill compliment to the integrity of all the witnesses examined in the cause, if I hesitated for a moment in deciding, that his testimony is incapable of prejudicing any other individual than himself. He has, with great propriety, been abandoned by almost common consent in the discussion of this cause.

Something has been said about the verdict, which took place in the court of common law, that there is reason to suppose that it was obtained by a collusion between the parties*. As the judgment

5th *Dec.* 1795.

* An allegation was given in, responsive to the first article of an allegation, admitted on the part of *John Elwes*, Esq. which pleaded "the verdict of the Court of Common Law," alleging [" that the verdict was obtained on the oath of one single witness, who did not even swear to any act of adultery, and that "the said witness was still in the service of the party." *Rejected under the observations of the Court, as infrà.*]—" That many "persons were subpœna'd by *George Daniel Harvey*, Esq. the "defendant, who were in waiting to be examined, to falsify the "evidence of the said witness, but that not one of them was "called

Elwes v. Elwes.

13th *July* 1796.

ment of this Court will not be founded on that verdict, it is of little importance how it was obtained; but the suggestion that it was obtained in the manner alleged, seems to me again to be totally unsupported. That no witnesses were examined on the part of the defence, may be, under any circumstances, a slight presumption, perfectly to be explained by different solutions, which have been afforded to my satisfaction. With respect to the damages not being paid at the time when the Solicitor

" called or examined, by reason that it was basely, shamefully, " and clandestinely agreed on, to the great injury of the character " and hurt of mind of the wife, and expressly contrary to the " assurances of the party, between husband and defendant, " through the means of the agents, solicitors, friends, or ad- " visers, that if the said defendant would not call those wit- " nesses, but would suffer the plaintiff to take a verdict, he " should risque nothing by the event of the suit, as the husband " would undertake for the payment of the costs and damages, or " would not receive them of him, or would repay them, if re- " ceived, which offer was accepted by the defendant, or by some " one on his behalf: that the husband, having collusively ob- " tained a verdict, the costs and damages have not been received " from him, or, if received, they have been repaid or remitted " back."

The admission of this allegation was opposed; it was however admitted by the Court, observing—" That the object of it was " to take off the effect of the verdict, as pleaded in this cause, " by shewing that it had been obtained by collusive means. " A verdict is admitted to be pleaded in the proceedings of the " Ecclesiastical Court;—It has been allowed for a considerable " time, though I never distinctly understood on what legal " principle it was originally introduced. It is often said, that " it is not direct proof, but merely a circumstance; yet that is " surely somewhat inaccurate; if introduced as a circumstance, " it can be only on the footing of a circumstance that makes " proof, though of a low kind, below what the law calls a " *semi-probatio*; yet still of the nature of evidence or proof;

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ELWES *v.* ELWES.

13th *July* 1796.

Solicitor was examined, that is accounted for in a manner which takes off what little suspicion it might create. What the witness says is, " that " the other Solicitor applied to him for payment " of these damages, and an inconsiderable sum

" but how can that be evidence against the party, which has " passed in a suit to which she was not privy. It is said that it " is introduced for the purpose of shewing there has been no " collusion :—Collusion, or no collusion, with the alleged " adulterer, is a fact which cannot, either way, legally affect the " wife, who is neither party nor privy, in the remotest degree, " to that litigation: nor do I understand in what view such an " action, against another party, can, in any degree, instruct the " conscience of the Court upon that issue between husband " and wife. Taking, however, the verdict as stated, that it is " introduced to shew there was no collusion, *that* alone is a suf- " ficient reason why the party should be permitted to shew that " the other suit was not carried on *bonâ fide*;—that it was a " mere fiction in the other Court. It is clear, as laid down in " the Duchess of *Kingston's* case (*a*), that all sentences, obtained " by collusion, are mere nullities; and all Courts may examine " into facts under which a sentence has been obtained by fraud. " In *Lloyd* v. *Maddox* (*b*), a prohibition, prayed on that ground, " was refused. It is therefore established, that a party may " shew another Court to be imposed on by covin of parties col- " luding together, and that he is at liberty to shew such col- " lusion; but he cannot go further—to allege the verdict to be " erroneous, or that evidence was improperly given. It is " pleaded here, that the verdict was obtained on the oath of one " single witness, who did not even swear to an act of adultery. " This seems to imply that the jury formed a wrong conclusion. " It pleads also, that the servant still continues in the service " of the party: that also may seem to insinuate that the jury " did not take all circumstances properly into consideration. " These facts are, I think, clearly not admissible. The rest, " which pleads that evidence was suppressed, and that there was " an agreement not to receive the damages, and that the cause " was so managed as not to bring out the merits of the case, " may be admitted."—Admitted as reformed.

(*a*) A. D. 1776. State Trials, vol. 20. p. 355.
(*b*) *Moore's* Rep. p. 917.

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"was postponed for the present." That I am to infer that these damages have not been subsequently paid, would be giving an effect to the testimony of this witness much beyond what his intentions or his expressions justify, and I have likewise the evidence of the Solicitors in the cause, persons perfectly acquainted with the whole course of the proceedings, who swear, that they are strangers to every thing of collusion, and that they have every reason to believe that the action was carried on *bonâ fide*, with the utmost sincerity, on the part of every person who was interested in the determination.

Another defence has been resorted to by counsel, that there has been a condonation: a defence, not set up by the party herself, and which, upon the face of it, is utterly inconsistent with the statement of her plea,—that there was a conspiracy productive of a false and malignant accusation against this lady—that this conspiracy has been systematically pursued—that agents have been employed—that witnesses have been bribed, and that the cause has been matured to its present form by these practices. The condonation supposes, that after this machine had been completely put in motion, and the whole business arrived at its ultimate maturity, and was prepared for explosion, and after the party was almost in possession of the fruits of his wicked industry, he did at this moment abandon the whole, and, by a remission or condonation to his wife, defeat the effect of all this activity, which had been employed for months before at the expence of guilt and anxiety. Now that defence appears to be so perfectly incompatible with every

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ELWES v. ELWES.

thing which the party herself has resorted to, that no very serious consideration is due to it.

15th *July* 1796.

It has been said, that not having been propounded by the party, it is excluded from the notice of the Court—undoubtedly, in fairness, it ought to have been stated, because, being a plea in bar, it is a plea which the plaintiff ought to have had an opportunity of contradicting; at the same time the Court is not precluded from noticing it, at least to this effect, that if the fact appeared clearly and distinctly, upon the face of the depositions, that there had been cohabitation, subsequent to the knowledge and detection of the guilt of the wife, It might, *ex officio*, call upon the husband to disprove it. But upon what proof does it rest in the case? Why, that, upon the night of the last fact of criminality, Mr. *Elwes* is proved to have been in town at his house in a considerable state of indisposition — and I am to infer that, on that very day, the witness informed the agent of what he had seen, and that the agent informed Mr. *Elwes*, on the same day, of the communication which had been made to him, and that Mr. *Elwes* did cohabit with his wife notwithstanding that information. This, besides its improbability, stands so destitute of proof, that it does not require minute discussion.

Mr. *Elwes* had employed persons to watch the conduct of his wife, and it is probable that the result was not communicated to him until the case was completed — a circumstance which occurs in all cases, where the discovery is not made at once. A husband has suspicions — he has some intimations — he has enough to convince his own mind, but not to instruct a legal case. In that dis-

ELWES *v.* ELWES.

13th *July* 1796.

tressing interval his conduct is nice, and it is difficult to refrain from cohabitation, as the means of discovery would be frustrated; and if he continues cohabitation, it then becomes liable to that species of imputation, which has passed to the disadvantage of this gentleman.

Taking the whole of this case into consideration, I am firmly of opinion that the facts of Adultery are proved; that, for a considerable space of time, and at different intervals, this lady shared her husband's bed with these two persons;—and I am satisfied of this, upon evidence which I deem to be credible, and which appears to me to be sufficiently concentrated, and in no degree invalidated by any adverse testimony: I am of opinion that the imputation of connivance is totally unfounded, and that the charge of subornation is likewise unfounded; and that the party is entitled to the sentence of separation which he has prayed.

Affirmed on appeal. *Arches*, 2d *May* 1797. *Deleg*: 26th *June* 1798.

SINCLAIR *v.* SINCLAIR.

1st *March* 1798.

Protest, Proceedings in a Court of *Brussels*, pleaded in bar to a suit *here* for a Divorce, by reason of Adultery, not sustained.

THIS was a suit of divorce, brought by the wife against the husband, by reason of cruelty and adultery; in which Mr. *Sinclair* appeared under *protest*, *alleging*, in bar of the proceedings, That such suit could not be entertained by the Court; for that the marriage had been celebrated at *Paris*, and had been since dissolved by a sentence of the Court at *Brussels*, on proceedings, instituted by him, for nullity and divorce by reason of the adultery of the wife.

In reply, it was alleged, on the part of Mrs. *Sinclair*, that there had been a marriage also solemnized in *England* in 1792, and that the pretended divorce was not for adultery, but a sentence of nullity of marriage; the fact of the aforesaid *English* marriage being entirely suppressed.—To which it was further answered on the part of the husband, that, although the sentence of the Court at *Brussels* purported to have passed in form only, as a sentence of nullity of marriage, it was really upon a proceeding for *divorce by reason of nullity and adultery*; and on consideration that the adultery had been fully proved, the husband had acceded to the prayer of the wife, that it might be described in the sentence as a sentence of nullity only, in order to avoid the public exposure that attended such sentences at *Brussels*, and that the ground of adultery was omitted in the sentence at the instance of the wife, and to save her reputation.

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On this statement, which was set forth in act of Court, Dr. *Laurence* argued in support of the protest, that as there had been a former suit in a competent Court in another country, where the parties had resided, it was entitled to be considered universally as conclusive, on the point adjudged, in all countries, and that there would be no marriage subsisting on which these proceedings could be had. That from the nature of that suit, it appeared also that the wife had been convicted of adultery, and that she could not therefore institute proceedings against her husband to pray restitution; although it had been said by some ancient authorities that the Court might take on itself to enjoin a reconciliation between them. That, with respect to the proofs required of the real nature of the suit at *Brussels*, the Court would make allowance for the destruction of all records, which had been occasioned by the Revolution there, and permit parol evidence of the nature of those proceedings, or allow further time to supply more authentic documents on that point.

On the other side, Dr. *Arnold* contended, that there was no sufficient foundation for any discussion of general principles; as the marriage, pleaded by the husband, was described to have been solemnized by a *Swedish* clergyman at *Paris*, and the divorce at *Brussels* had passed on that marriage, whereas the wife pleaded a marriage at *London* in 1792. That the description attempted to be given of the nature of the divorce did not agree with the tenor of the instrument exhibited, and the Court would not permit a different cha-

SINCLAIR *v.* SINCLAIR.

1st *March* 1798.

racter to be fixed upon it by parol evidence. That the Court at *Brussels* was described as a Court of competent jurisdiction for strangers; but there was no proof that Mr. *Sinclair* was entitled to be considered as a stranger, since he describes his own residence to have been generally on the Continent, but principally at *Brussels.* That on these grounds the Protest was untenable, and it was prayed that the Court would overrule it.

JUDGMENT.

Sir *William Scott.*—This is a suit originally brought by *Lucy Ann Sinclair* against *John Gordon Sinclair*, for separation, by reason of cruelty and adultery, to which he has appeared under protest; and I am to inquire whether this protest states any thing that should prevent the Court from investigating the facts of the complaint. Mr. *Sinclair* describes himself to be a native of *Scotland.* That circumstance will not affect the jurisdiction of this Court. He states, also, that the marriage was had at *Paris*:—That, likewise, is no objection; since, wherever the marriage was celebrated, this Court may inquire into its validity, looking, as it would, to the laws of the country, and would enforce the matrimonial duties on all persons within its jurisdiction. It does not appear, even, that the affidavits support the act in the description which they give of his residence, since they do not represent him to have been a domiciled and incorporated inhabitant of *Brussels*, but to have been in the *English* army in *Flanders*, and, on that account only, subject to the laws of *Brabant*, in matters arising out of his conduct in that country.

He describes his suit against his wife to have been for divorce, by reason of adultery, acknowledging,

ledging, by that very charge of adultery, the marriage *de facto*, which is, nevertheless, now to be impeached by these proceedings as null and void.

Something has been said on the doctrine of law, regarding the respect due to foreign judgments; and undoubtedly a sentence of separation, in a proper Court, for adultery, would be entitled to credit and attention in This Court; but I think the conclusion is carried too far, when it is said, that a sentence of nullity of marriage is necessarily and universally binding on other countries. Adultery and its proofs are nearly the same in all countries. The validity of marriage, however, must depend, in a great degree, on the local regulations of the country where it is celebrated. A sentence of nullity of marriage, therefore, in the country where it was solemnized, would carry with it great authority in this country; but I am not prepared to say, that a judgment of a third country, on the validity of a marriage, not within its territories, nor had between subjects of that country, would be universally binding. For instance, the marriage, alleged by the husband, is a *French* marriage; a *French* judgment on that marriage would have been of considerable weight; but it does not follow that the judgment of a Court at *Brussels*, on a marriage in *France*, would have the same authority, much less on a marriage celebrated here in *England*. Had there been a sentence against the wife for adultery in *Brabant*, it might have prevented her from proceeding with any effect against her husband here; but no such sentence any where appears.

The only instrument, which is produced as a sentence, does not contain a word respecting adultery:

adultery: It speaks singly of nullity: And parol evidence cannot be admitted to explain and give a totally different effect to the instrument from what it purports itself to bear. The instrument directly rebels against the allegation of the protest.—That there was any proceeding for adultery is contradicted by the plain language of the authenticated instruments. It is a confusion of terms, as has been observed, and what is not often seen in a matrimonial court, to begin first with disputing the validity of the marriage, and then to go on to prove, as against an established marriage, the offence of adultery. What a strange proceeding it is, as well on the part of the Court, as on that of the parties! That the cause should have gone on to sentence on proofs of Adultery, and that a Court of Justice could accede to the prayer of a party, and change entirely the form and substance of the sentence by pronouncing for a divorce on the ground of nullity only. It is difficult to believe that such could have been the conduct of any Court whatever: And if it has been so, it is quite sufficient to dispose of its authority.

The paper, which has been exhibited to prove the examination of witnesses, *de bene esse*, on Adultery, is nothing but a licence to examine on that charge; but there is no mention of any actual proceeding, or any sentence on that charge. How is it possible then to say, there has been any sentence in a Foreign Court for Adultery, which should stop this Court from giving to the wife the benefit of the laws of this country? I must therefore declare the protest insufficient, and direct Mr. *Sinclair* to appear absolutely, and answer the general charges of his wife's suit.

WILLIAMS *v.* WILLIAMS.

16th *May* 1798.

Divorce, by reason of adultery of the wife, not decreed.—Circumstances, how far sufficient.—*Identity* not proved.

THIS was a case of Divorce by reason of the Adultery of the wife, in which the Identity of the wife was not established.

JUDGMENT.

Sir *William Scott*.—This is a proceeding, instituted by Mr. *Williams*, to obtain a divorce on a charge of Adultery; and, if he has laid before the Court sufficient proofs, he will, no doubt, be entitled to it: But if he has not established the necessary facts, either from disability or accident, or from the less laudable motive of trying the experiment of how little proof will be accepted as sufficient, or from whatever circumstance, he must fail notwithstanding any private opinion, which the Court may entertain, on the real merits of the case. There are some circumstances in this case which alarm the jealousy of the Court, as appearing a little suspicious: There is no plea on the part of the wife, nor any interrogatories administered. The verdict, which has been pleaded, was obtained nearly on default, and without any defence. This proves a great facility at least, and will make the Court more vigilant to see that the two main points of such cases are sufficiently proved, viz. the criminal act, and that the person, against whom the proof of that act is established, was the wife.

It is undoubtedly true, that direct evidence of the fact is not required, as it would render the relief of the husband almost impracticable; but I take the rule to be that there must be such proxi-

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WILLIAMS *v.* WILLIAMS.

16th *May* 1798.

mate circumstances proved, as by former decisions, or on their own nature and tendency, satisfy the legal conviction of the Court, that the criminal act has been committed. The Court will look with great satisfaction to the authority of established precedents; but where these fail, It must find its way, as well as It can, by its own reasoning on the particular circumstances of the case.

The libel pleads the marriage, which is not denied, and is sufficiently proved, in 1789. The parties cohabited several years, till *September* 1797. But it is pleaded, that in 1794, a particular intimacy was contracted with a Mr. *Thomas*, who frequently visited at the house; but no notice is taken of a circumstance, which appears in evidence, that he actually lodged and boarded in the house three months during the year 1796: The greatest intimacy therefore subsisted between both the parties and Mr. *Thomas*; and I am to presume that no improper familiarity had been observed till this time, or Mr. *Williams* could not have permitted him to lodge in his house: and to suppose otherwise, would be to suggest that, which would surely excite the legal suspicion of the Court. I will take it however more naturally and justly, as if there was nothing improper known to Mr. *Williams* in 1796; but it is not explained why Mr. *Thomas* went away, since there was no quarrel, as he continued to visit.

I must observe, that there is very little of the history of the case brought before the Court. It is alleged on the fourth article, that he came clandestinely in the absence of the husband, and took indecent liberties: there is however no witness examined on this article; but the maid servant, who says, "that

" that after he ceased to live there, he called often " about two o'clock, when the husband was usually " not at home." She mentions nothing of improper liberties, and there is nothing to convince me that he did not, at that time, continue the friend of the husband, as well as of the wife. It is next pleaded, that the husband began to entertain suspicions, and remonstrated with his wife; but there is no evidence of this in the depositions. It is said, that this would be a secret transaction; but it would be probable that the husband would mention it to some one of his own family, or the friends of his wife; and, unless it appears in some way as a fact in the case, the Court can take no notice of it. Particular visits are likewise pleaded; and it is alleged that, on one occasion, happening on the 10th of *May*, the husband surprized them together, and that there was great confusion and agitation betrayed by them, and that Mr. *Williams* forbad Mr. *Thomas* to come any more to the house. This would be a fact that would make a strong impression on the mind of the Court, if it was proved; but all the effect of the evidence is, — that Mr. *Williams* came and found this person with his wife, and further the witness cannot depose: there is no proof of the agitation of the parties, nor that the door was obstructed, nor of any disapprobation expressed by the husband; and the Court cannot make inferences without actual proofs to support them.

The next act pleaded is that Mr. *Thomas* took lodgings in *Staples Inn* for the purpose of carrying on the adulterous intercourse; and that the wife visited him there, and stayed a considerable time, and that they passed for husband and wife.

On this part of the allegation, *Mary Johnson* says,

WILLIAMS v. WILLIAMS.

16th *May* 1798.

says, "that in *March* 1797, *Thomas* hired the "lodging, consisting of a dining-room, a bed-room, "and closet, saying, that he lived in the country, "and wanted a place in which he might write and "transact business; that he should bring his wife "to drink tea; and that he afterwards brought a "lady, whom he called Mrs. *Thomas*, who stayed "two or three hours, two or three times a week, "and that he was not visited by any other person." This is the whole of her deposition. There are two other persons, who were employed by *Williams* to dodge his wife, who prove "that they often saw "Mrs. *Williams* go to this house, and stay there, "and that *Thomas* afterwards came out with her."

It is said that this is complete proof of adultery; and a case is alluded to of *Eliot* v. *Eliot* *, in which the Court decided,—that a woman, going to a brothel with a man, furnished conclusive proof of adultery. And it is asked, what is the difference between that case and the present? since it cannot be presumed that Mrs. *Williams* went for innocent purposes to a house occupied in this manner. This, however, assumes many facts: first, that it was not his ordinary lodging, and that she knew it. It is not proved, as assumed, that she took the name of Mrs. *Thomas*; he called her so, and said that she was his wife; but it is not proved that she called him her husband, or that she knew that he called her his wife: He might speak of her in that name, but that will not shew her knowledge of the fact. The only circumstance of clandestinity which is proved, is, that *Thomas* attended her almost to her own house, and then left her; but that the Court should infer that this happened

* Consist. 20th *Feb.* 1775. Arches, 23d *Feb.* 1776.

from

from a clandestine intention, or that it might not be by accident, is, I think, not warranted by any rules of evidence on which this Court can safely proceed.

The question then comes to this,—does the visit of a married woman to a single man's lodging or house, in itself, prove the act of adultery? There is no authority mentioned for such an inference, but the case of *Eliot* v. *Eliot*, which is open to the distinction, arising from the character of the house in that case, which is too obvious to be overlooked. It would be almost impossible that a woman could go to such a place, but for a criminal purpose; but in the case of a private house, I am yet to learn that the law has affixed the same imputation on such a fact. In a late case of *Ricketts* v. *Taylor* *, in the King's Bench, the visit of the wife to a single man's house, combined with other circumstances, was held sufficient. In that case, the windows were shut, and there were letters which could not be otherwise explained. That case, therefore, is no authority in this inquiry; and though the Court might be induced to think that such visits were highly improper, It must recollect that more is necessary, and that the Court must be convinced, in its legal judgment, that the woman has transgressed not only the bounds of delicacy, but also of duty. There is nothing stated of any improper conduct in the observations that were made upon the conduct or behaviour of the parties at this lodging,—no description of the bed-room, or any such circumstance; and, if there had been such appearances, it is scarcely possible that they should have been forgotten; but none are

* Consist. *Ricketts* v. The Right Honourable Lady *Elizabeth Ricketts*.—A sentence of divorce was pronounced in this case on the 20th *Feb.* 1799.

brought

WILLIAMS v. WILLIAMS.

16th *May* 1798.

brought forward that can induce a presumption of any conjugal act.

The whole amount of the evidence on this article is, that she visited at these lodgings, not calling herself Mrs. *Thomas*, and not knowing that they were not his ordinary lodgings,—without any other proof of clandestinity than that, on two or three occasions, he did not accompany her quite to the house of her husband. In a following article it is pleaded, "that Mr. *Williams*, being con- "vinced of her criminal intercourse, on the "9th of *September* separated himself from her "bed, and on the next day he charged her with "it, and she eloped." The libel does not here go on, in the usual form, to say, that, when he charged her with this accusation, she did not deny the same; and there is no proof as to the manner in which the charge was received: She retired,—but to what place does not appear. Four days afterwards her sister received a letter from her, which the Court is required to consider as supplying that proof which might without it be incomplete. It is called a confession.

The Court, however, must remember, that confession is a species of evidence which, though not inadmissible, is to be regarded with great distrust: There is a canon particularly pointed against it, which says, "*nec partium confessioni fides habea-* "*tur* *;" and though it is evidence which is not absolutely excluded, but is received in conjunction with other circumstances, yet it is, on all occasions, to be most accurately weighed. The expressions are, "I am very unhappy—for God's sake, hide "my faults—those who know not what I suffered, "will blame my conduct very much."

* Canon, 105.

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Am I then placed in such a situation, by this evidence, as to say that it must necessarily refer to adultery? She has been detected in imprudent visits — it might allude to them. Can the Court infer the admission of adultery from these expressions, where nothing is proved but visits? The husband may presume more; but the Court, considering the weight of circumstances accurately and judicially, does not feel itself warranted to say that they amount to a confession of adultery, or that such is the necessary interpretation of them. The mention of *Thom* in that letter is also interpreted to mean Mr. *Thomas*; and though the witness says, she believed it meant Mr. *Thomas*, it is not a natural appellation, and does not carry that part of the case further. Where she passes that interval of her elopement is not shewn. She might be living with her family, but all that is left in blank.

The next fact is, what passed at *Gravesend*, where the officer of the Court went, by the direction of the Proctor, and served the citation upon her. That there were two persons in the house at *Gravesend* at that time—one passing by the name of *Thomas*, and a woman with him, who slept and cohabited together, is proved beyond all doubt. And the Court has only to consider in this part of the case, whether the identity of the party is sufficiently proved. The rule, which has been laid down on this point, is solid, and very necessary to be carefully observed — that the identity is to be proved, not merely by acknowledgment to the officer, and by the appearance of the party in the cause, but by extrinsic evidence. The belief of the officer is necessarily founded on various incidents in the

WILLIAMS v. WILLIAMS.

16th *May* 1798.

cause, before and after the citation, and is not alone sufficient. The Waiter and Chambermaids at the Inn, speak nothing to the identity, as they had no previous knowledge of the party, and can form their opinion only from this inquiry.

Then how stands the evidence on this point? It is said, that she had before assumed the name— but that is not shewn—only that *Thomas* called her so. Is the Court then, on the mere answer to the libel, to presume identity? It is said, that she is gone abroad, and that it is not in the power of the husband now to identify her more particularly. The Court, however, wishes to know what prevented him from sending down some person, who had known her previously, together with the Officer of the Court? It was known that the Officer of the Court was not acquainted with her, nor the witnesses at *Gravesend;* and also that Mr. *Thomas* was on his way to the *Cape of Good Hope.* The Court is not to be left to conjecture on a point so material, and where precise and satisfactory evidence might easily have been obtained. *

On the verdict I need not observe that it is no evidence against the woman: It is only introduced into these proceedings to satisfy the Court, that the husband has honestly endeavoured to obtain all the redress that the law will afford. In this case, it appears to have passed by default. Under all these circumstances, whatever may be the private opinion impressed on my mind by some parts of the evidence, I do not feel myself to

* The Court, about this time, had occasion to make similar observations, on the defect of proof of Identity, in other cases in which the proceedings failed on that ground.

be judicially warranted to pronounce, that the proof of the necessary facts, which the law requires, has been established, and therefore I must dismiss the party from this suit. The case will probably be submitted to a more experienced tribunal *; and from which I shall be glad to receive any information, for my future guidance, that may be given. But, on my own judgment, I cannot pass this divorce.

WILLIAMS v. WILLIAMS.

16th *May* 1798.

HUBBARD v. BECKFORD.

20th *June* 1798.

Dilapidation.—Demand against [Sequest]rator. Objection thereto, "that he was not liable for more than the surplus, on rendering his account,"—not sustained.

IN this case a decree, to answer to a demand of dilapidations, had been taken out, on the part of the Rector of *Shepperton*, against *Beckford*, the person who had been receiving the profits of the living of *Shepperton*, under a sequestration, obtained against the late Incumbent by virtue of the King's writ to the Bishop of the Diocese.

An allegation † was offered on the part of the Sequestrator, to which Dr. *Nicholl* and Dr. *Laurence* objected

12th *Dec.* 1798.

* This cause was appealed to the Court of Arches, where an additional allegation was given in, pleading the Identity in a fuller manner, and on which no doubt remained in the case. —The Divorce was accordingly decreed.

† The allegation pleaded the facts on which this Sequestration had been obtained; that there had been other Sequestrations issued, on which he, *Beckford*, prior to the death of the Rector, had been called upon, by citations, as receiver of the profits of the rectory of *Shepperton*, to render a true account of what he had received, and that he exhibited an account accordingly; — that

objected — That, by the admission of the libel without opposition, the principle had been allowed, that the Sequestrator was liable to dilapidations: That it was a charge from which the Incumbent could not exonerate himself; and any other person, standing in his interests, was equally liable to it: That repairs were mentioned in instruments of sequestration, as an incidental expence attending the sequestration: That the third article of the allegation, in substance, admitted such previous demands, by claiming an allowance for some repairs, and for the service of the Church: That the same principle was to be acted on throughout. The claim, in this case, was only £250, and the balance in the estimates was not more than £200, £50 being allowed for old materials: That it had been expected that this demand would have been amicably settled; but the expences of defending this suit and another, which ought not to have been resisted, had been now pleaded in diminution of the effects; and it was hoped that the Court, seeing that this allegation could have no legal effect, would reject it, and thereby prevent further expence.

In reply, Dr. *Arnold* and Dr. *Swabey* denied that the principle of this demand was admitted, and contended, that the Sequestrator was only liable to

that out of the tithes he had collected, he had expended considerable sums of money on the reparation of the rectory house, barn, stable, &c. and likewise for the use and service of the Church, and various other perquisites, charges, &c.; — that Mr. *Beckford* is ready and willing to exhibit his vouchers in support of this account, if required; and that he now is, and always hath declared himself willing to pay the balance, if any, in whatever manner the Court shall direct, on being legally indemnified.

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pay over the surplus, after his own demand had been satisfied, as offered by him in his allegation. The objection, therefore, was to be considered on general principles, as stated to that article of the allegation; but it could not be sustained. It is not true, that dilapidations are to be claimed of the Sequestrator, in preference to his own demand. The *writ* to the Bishop is mandatory and imperative, and contains no qualification, that will authorize the Bishop, to retain any portion of the receipts for dilapidations; nor can the Bishop himself engraft any such limitation upon it. If he could, the effect of the instrument might be entirely defeated: The Sequestrator is not bound to do more than account faithfully for the surplus, after his debt is satisfied.

There is no priority, in this case, in favour of dilapidations: the benefice might have been sequestered for causes growing out of the authority of the Court *alone*, and, in such cases, the Court might have authorized previous deductions for repairs of dilapidations. But here the dilapidations constitute only a simple debt, and there are these conflicting claims of a superior class, as on judgment debts; and the Court cannot support the former to the prejudice of the judgment creditor. It was submitted, therefore, that the Sequestrator is entitled to pay himself, and to reimburse himself for all costs incurred in defending suits brought against him, as they are expences falling on the Living, and incurred only in defending the possession, which the law has given to him.

HUBBARD *v.* BECKFORD.

30th *June* 1798.

JUDGMENT.

Sir *William Scott.*—This is an allegation offered on the part of a Sequestrator, who has been appointed the receiver of the profits of the living of *Shepperton*, under the King's writ, directed to the Bishop, on which this sequestration has issued. It pleads—that the Sequestrator has incurred sundry charges, which he desires to be permitted to stand in his account, and to be dismissed upon paying over the surplus, after the discharge of his own debt. The objection taken is not so much to the particular items of the account, as to the general principle. Some part of the allegation is merely introductory. With respect to what has actually been done under this sequestration, it is highly necessary that the Court should have before it the account, which the Sequestrator is bound to render to the Ordinary, of what he has done, under the authority delegated to him. I shall therefore admit this allegation as to those parts, observing also that there ought to be stated the date of the first sequestration, an omission which must be supplied.

It may be proper, however, to say a word on the general question, and with respect to the points which have been the subject of discussion in the argument, and which may come before the Court again, at the final hearing of the cause. On the general principle, I am inclined to hold, that the Sequestrator will be liable for dilapidations. The King's writ issues to the Bishop to levy a *sum* for the discharge of the debt.—This writ has been truly described as mandatory to the Bishop, who is, in a general sense, only minis-

terial.

terial*. The Sequestrator is a kind of Bailiff to the Bishop. There is no mention of any purpose, but the payment of the particular debt: it is, however, a thing incident to, and inseparable from, the subject-matter itself, that there are certain duties and expences for which the Sequestrator is bound to provide.

The instrument issued under the authority of the Bishop, and contains a clause of allowance for all necessary charges; and I do not know on what principle it can be maintained, that the repairs of the

* On the duty of the Court to carry such writ into immediate execution, the following case has occurred:—In *Campbell* v. *Whitehead*, Consist. 6th *December* 1820, an application was made to the Court, on the part of Sir *Alexander Campbell*, for a sequestration of the Vicarage of *Little Clackton*, *Essex*, on a writ of *levari facias* directed to the Bishop. It appeared that two writs had been lodged in the Registry of the Court, one, by *Whitehead*, in *November*, the other, granted to the plaintiff, at a later period. A *caveat* had been entered against the first, on the part of the plaintiff, and it was certified that the Court of Common Pleas had superseded that writ for irregularity on the 28th *Nov.* On the second writ a *caveat* had also been entered, and on its being warned,—Dr. *Dodson* now prayed, that sequestration might issue on the second writ, and contended, that the Court was bound to act immediately in carrying it into execution; that it was in the nature of a *fieri facias*, or *levari facias* to the sheriff, who had no discretionary power, but was bound to execute the first writ when presented to him, as has been held strongly in cases of divers writs, and even when there had been a seizure on the second writ (*a*); that, in this case, the Court of Common Pleas had rescinded the first writ, and the second was therefore entitled to priority, being, in fact, the only one in force; that the Bishop is to be considered as an ecclesiastical sheriff, and his office was merely ministerial; that no danger however could accrue to the Bishop, as bond had been given to him; that if there had been any error in rescinding the first writ, the Bishop should be indemnified.

On the part of Mr. *Whitehead*, Dr. *Swabey* resisted this prayer, upon the ground, that the first writ had been repealed in error by the

(*a*) 5 *Mod.* 376. 1 *Salk.* 320. 1 T. Rep. 729.

HUBBARD v. BECKFORD.

20th *June* 1798.

the Chancel, and of the parsonage, are not necessary charges. The Clergyman is, by law, equally required to provide such repairs, as well as the performance of Divine Service, and he cannot exonerate himself from one of those duties, more than from the other. The creditor is the person to whom the sequestration is usually granted; but that is only for the convenience of the proceeding under it, and by the authority of the Bishop. The sequestration might have been granted to the Churchwardens, or to others; and the creditor is to act, as any other person would be bound to act in that character, — he is not to give to himself that preference, which a third person could not be compellable to allow.

I throw out this observation, as the substance of my opinion, on the general question, when it

the Court of Common Pleas, and stated, that, on the first day of next term, that Court would be moved to rescind the order so made; and relied on the opinions of Mr. Sergeant *Pell* and Mr. *Chitty*, which had been given to this effect. He therefore prayed the Court to defer to make any order, on this application, till the next Court day: and submitted, that the Court must have such discretionary power, as otherwise the opposite party could not have been justified in stopping the progress of the first writ?

JUDGMENT.

Sir *W. Scott.* — It would have been my duty to have proceeded upon the first writ if granted and unrevoked; because I am of opinion that the Court is bound not to delay the immediate execution of a writ, but to give the party all the benefit of priority. It is however shewn, by a notice which has been left in the Registry, that the first writ has been revoked as *irregular*, and *informal*, and that is not denied — though it is said to have been so superseded by error. There is nothing before the Court, which shews, that the first writ *was* revoked, in error, except the professional *opinions* of two Gentlemen at the bar: but whatever respect I may pay to those individuals, I cannot put their opinions in opposition to the judicial decree of a court of justice. The Court is therefore bound to direct sequestration to proceed immediately to Sir *Alexander Campbell.*

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shall hereafter be brought fully before the Court; and I am inclined to hold that the sequestrator will be liable for charges of this nature, as inseparable from the benefice—and that they could not be disjoined from the duties of the sequestration, even by the authority of the Bishop, as observed in argument, even if he could be supposed to have sanctioned any such pretension.

30th *June* 1798.

On a subsequent day, a further allegation was given in, pleading, in substance, that since Mr. *Beckford* had exhibited, on oath, the account of the tithes, profits and emoluments of the Rectory of *Shepperton*, as by him collected and received, he had expended the sum of £112 upon the two barns, and their appurtenances, and had caused them to be effectually reinstated and repaired. To the admission of this additional plea, it was objected,—that it was no answer to the general demand;—that the sum, stated to be expended, was more than the estimate on that part of the premises, and had therefore been improvidently expended;—that, as it had been done since the commencement of these proceedings, it was an act of the sequestrator in his own wrong, and could not be set against the general demand which had been made upon him.

6th *Dec.* 1798.

The Court said—If I understand the nature of this allegation, it means to plead, in answer to the libel, claiming £74 for one part of the dilapidations,—that Mr. *Beckford* wishes to shew that he has expended £112. It is quite impossible that I should permit such an averment, in opposition to the claim made upon him, for that part of the dilapidations: that, being charged with dilapidations, on one item, to a particular amount, he has laid out more than the sum required. It is an irregularity, perhaps, that he should have done any

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HUBBARD v. BECKFORD.

6th Dec. 1798.

thing to the barns, since the time of giving in the Libel in these proceedings. From that time, the matter was under the protection of the Court; and perhaps the Court would not exceed its legal power, if It was to refuse to take any notice of such an expenditure. Equity may suggest, however, that he should be entitled to some allowance, but only to the amount of the sum claimed in the libel.

The Court will therefore give him the opportunity of pleading simply—that he has repaired the barns; but It will not permit him to enter into a specification of the expenditure, beyond the estimate of it in the article of the libel.—I must here observe also, that suits for dilapidations are necessarily attended with great expence; and they ought not therefore to be instituted *here*, except upon *great* occasions. I strongly recommend to the parties to come to some accommodation. If however they go on, and it may be necessary to act on my directions on the matter now pleaded, I admit the article, subject to the alteration, which has been before sufficiently explained.

WALTER *v.* GUNNER AND DRURY.

30th June 1798.

Right of Parishioner to a seat in the Parish Church.—Insufficiency of the return of Churchwardens, to an application for that purpose: Rule of construction as to Custom and the extent of a Faculty.

THIS was a proceeding against the Churchwardens of *Teddington*, calling on them to shew cause why they had not seated, or caused to be seated, the plaintiff and his family in the Parish Church, according to his situation and condition, he being a principal Inhabitant and Parishioner, and having duly applied to them to be so seated.

An appearance was given for the Churchwardens under protest, admitting the averment set forth in the

the Citation, "that he is a principal Inhabitant, "and that he had applied to them," at the same time alleging, "that this was not sufficient in law "to entitle Mr. *Walter* to cite them in this form;" and further, "that the Church was so small, and "the number of Inhabitants so much increased, "that many persons were obliged to submit to "considerable inconvenience, some in sitting with "others, some in having no seats; that many seats "were held by custom, attached to houses in such "a manner, that, though the owners did not use "them, they were occupied by their tenants; that "the Churchwardens have not interfered with such "customary possession; that the house, which "Mr. *Walter* occupies, was built by a Jew, who "never applied for a seat; that in 1796 Mr. *Walter* "applied for a seat, and a vestry was called, at "which it was determined that persons should "have permission to erect pews in a gallery, on "payment of £5 to the parish; that this offer "had not been accepted; that the plaintiff had "refused to pay the Church-rate, unless he "was seated: That it was then proposed that a "vacant place should be enclosed; and notice was "given to him that a vestry would be held for "that purpose; but he did not attend: That the "Churchwardens are desirous of accommodating "all persons as well as they can without disturbing "the possession of others; that they had no right "to dispossess them, but were ready to submit to "any order which the Court might make upon "them."

On the other side it was alleged, "that, by law "and usage, all pews, except those held by faculty "or other legal title, ought to be distributed

"amongst

Walter v. Gunner and Drury.

20th June 1798.

"amongst actual Parishioners; that many of the "largest were assigned to persons, not living or "having lands in the parish; that others were "annexed to houses, and let out by the owners to "persons not living in the parish; that it was in "the power of the Churchwardens, by a legal "exercise of their authority, to seat the com- "plainant; that his house was one of the largest "in the parish, and though he had applied in "1796, and the following years, nothing effectual "had been done." It was replied, "that the "pew held by *Seton* is reputed to be annexed to "the house of Mr. *Retford*, and that part of his "family used to sit there; and the other occu- "pied by Lady *Murray*, was annexed to another "house, called *Comb House*, which was now a "school; and that the pew being too small for the "boys, they were allowed to occupy seats in the "gallery at a certain rent; that the Churchwardens "did not consider themselves to be authorized, by "virtue of their office, to disturb the possession "of these parties."

Judgment.

Sir *W. Scott.*—I think the process has issued very properly in this case, and that this is a convenient mode of proceeding, by citing the Churchwardens, in a civil suit, to shew cause, &c. as in this citation. I do not think that it was necessary to allege that any particular pew was vacant, as it would be a sufficient return, on the part of the Churchwardens, to aver, that they were unable to comply with the request, on account that there were no such vacancies. If that return was made and duly established, I fear it might be entitled to much consideration, as in the

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enlarged population of Parishes, in the vicinity of this Town, it may really not be in the power of the Churchwardens, to make *immediate* additions to the fabric, or to build Chapels at once for the accommodation of the Inhabitants. The return, in this case, is not of that kind. It consisted of two parts; that notice was given of a vestry, and that an offer was made, that the party might erect a pew, on a condition which is not strictly legal — that he should pay the Parish for it. It is clearly the law on this subject, that a Parishioner has a right to a seat in the Church, without such payment: but I think the return is bad on another ground; for, although it might be sufficient, if there was no pew vacant, yet if there are existing pews improperly occupied, the mere offer of a permission to erect a pew is not a good return.

The other part of the return is bad also, since it pleads a custom, which is evidently illegal, and cannot be supported — that pews are appurtenant to certain houses, and are let by the owners to persons who are not Inhabitants of the Parish. All private rights in pews must be held under a faculty, or by prescription, which presumes a faculty, and no faculty was ever granted to that effect; for the Ordinary must have exercised his discretion, to depopulate the Church of its own proper Inhabitants, if he could have granted such a faculty. The plea goes on to state "that the Churchwardens have "not ventured to disturb such occupiers;" to which it is answered justly, that they have not done their duty, for they ought to have prevented an occupancy of that kind.

There is something stated also of a custom, that others, who have not pews appurtenant, pay a rent for seats, which is applied in easement of the Parish

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Walter v. Gunner and Drury.

30th June 1798.

rate — a practice, which has been constantly reprehended by the Ecclesiastical Courts, and discouraged as often as it has been set up *. Then the

* In *Stevens* v. *Woodhouse* and *Puller*, Arches, 25th *Feb.* 1792, on appeal from the Decanal Court of Wells, as to the grant of a faculty for the erection of seats, the Judge of the Court of Arches observed, — There is one clause in the faculty which is illegal, — a permission to the parties erecting seats to sell the same. This is a practice which may have prevailed frequently; but whenever it had appeared before the Court, it has been *constantly* discountenanced. — The Court then referred to the following cases: — The Churchwardens of *Kensington* v. *Tryer*, Consist. 1721; "In which the "Churchwardens and Vicar, in order to pay the expences of new "pews, had assigned pews to certain persons, their heirs, executors, "&c. for sums specified. — The Court held this to be illegal, and that "the Churchwardens might seat the parishioners in those pews "as if no such order had been made."

In *Harford* v. *Jones*, Consist. 1724,: "The Vestry had granted, "for £10, a pew to R. and his assigns, appropriated to such "house as he should build. He assigned to *Jones*, — *Jones* applied "for a faculty, — The Court disallowed the claim of *Jones* to a pew, "and ordered him to be placed in the common part of the church." In *Hole* v. *Burnet*, Consist, 1740: Suit of perturbation, — The party pleaded purchase and the custom of parish. The Court rejected the libel, and held the custom illegal. In *Astley* v. *Biddle*, Peculiars, 1774: *Astley* took a house, to which a pew had belonged forty years, — The Churchwardens demanded money, — on refusal, they placed another person with him. The Court "admonished "them not to disturb, and to desist from the practice of selling."

Having stated these precedents, the Court further observed, "These cases all shew, that even where the order has been made "to defray expences, it has always been held illegal. It is said, "however, that former cases had been instances of old pews, "but that the agreement here is for building new pews. This "cannot influence the Court, or make the act legal. It may be "true, as it has been remarked in the argument, that this is fre- "quently done, particularly in chapels. But they are private pro- "perty; *This* is an old parish church; and I am of opinion, "that neither the Parishioners, by their consent, or the Ordinary, "or any power but the Legislature, can deprive the inhabitants "of a parish of their general right, and that such acts are con- "trary to the law of the land." — The faculty was therefore pronounced illegal, and the sentence of the Court below reversed.

WALTER v. GUNNER and DRURY.

30th June 1798.

the return is, I think, insufficient; and the party has shewn that there are pews occupied by persons not living in the Parish, and that a particular Individual has obtained a large portion of the Church, and let his own pew to a non-resident person. There is one pew appurtenant to the house of Mr. *Retford*, who does not live in the parish, and who covenants with his tenant, that he shall not occupy it, in order that he may let it out to others. This is clearly illegal. If a pew is rightly appurtenant, the occupancy of it must pass with the house; and the individuals cannot, by contract between themselves, defeat the general right of the parish. It appears that the house has been built only eighty years, which is not sufficient to establish a prescriptive right; because it might be presumed that evidence of the grant of a faculty was not extinct in that time; but even if there was a prescriptive right, it could not be exercised by transferring it to persons, not inhabitants of the house, or of the parish. Such possession cannot be maintained. There is also another instance, in which the parish has given way to the partial convenience of one person, who holds a house to which a pew may be appurtenant: When, however, he was indulged with a gallery, the parish ought to have required him, to exchange his own pew for that accommodation. He ought to be required to go back to his own proper pew, or give it up to the parish; as it is now used in the same improper manner by inhabitants of another parish.

The Court, therefore, is bound to overrule the protest; but I shall not do more, or give any costs against the Churchwardens: for they have been acting under the general sense of the parish, and

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WALTER *v.* GUNNER and DRURY.

30th *June* 1798.

it is difficult for such persons to bear up against it. It is possible that the parties, whose rights are asserted, may have something more to allege in defence of them, and they must not be precluded. But I shall overrule the protest, giving such parties an opportunity to intervene.

10th *July*.

On a subsequent day, this cause came on again, on the prayer of the Plaintiff, that one of the Churchwardens might be directed to seat him in the pew occupied by Mr. *Seton*, by the 22d of the present month. The Court asked,—Whether any notice had been given to Mrs. *Griffiths?* It was replied,—that there had been notice.

JUDGMENT.

Sir *William Scott.*—I think Mr. *Retford* is sufficiently before the Court by the affidavit which he has made; and that It is therefore at liberty to proceed to make a specific order in this case. The general principles on this subject have been already laid down; and the parties, having had an opportunity of intervening to assert, and support their claims, I am now to inquire what has been set forth, that should prevent the Court from applying those principles to the case before it. Mrs. *Griffiths* has made no application to the Court on the part of Mr. *Retford*, but his own affidavit has been introduced; and I am now to decide on the prayer that the Plaintiff may be seated where Mr. *Seton* is at present placed, being the seat claimed by Mr. *Retford*. The seat, claimed by Mrs. *Griffiths*, is said to be appurtenant to an ancient messuage, which she occupies in the parish; but it does not appear whether as owner, or tenant; nor

nor is it material; because, if it is really appurtenant, it will go to the Tenant.

It seems that Mrs. *Griffiths* has kept a school some years, and applied to the Churchwarden for an allotment of room in the gallery, which was given—she retaining her pew; and that she has since let out her pew to some ladies of another parish. The Churchwardens of that time did wrong; for they ought, if the pew was really appurtenant, which does not appear, either to have granted additional space with the old pew, or to have insisted that it should be given up to some parishioner; but that she should take sufficient room for her accommodation elsewhere, and be allowed to let out her pew to persons not resident in the parish, is an abuse which cannot be maintained; for it is a wild conceit that there can be such use made of pews, as of villas or other common property. These are possessions of more qualified property, to be used in a certain and prescribed manner. It is a sufficient indulgence, which is usually given by faculties, in granting the exclusive use; but no faculty was ever granted for purposes like this.

It has been held, that a faculty to a man and his heirs would be bad; because his heirs may reside out of the parish, and it would be an unjust usurpation, in the parishioner, to detain such a privilege for the use of others. If the Court does not proceed therefore to disturb Mrs. *Griffiths*, it must be understood to be on this consideration, that there is another pew more proper to be used; and with this intimation, that if any other person should apply to be seated, the Court will consider itself

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Walter v. Gunner and Drury.

10th July 1798.

at liberty to make such order with respect to her pew.

Mr. *Retford* says, that his house has been built upwards of eighty years, and that the pew has been exclusively used by him, and that he has covenanted with his tenant that he shall not sit in it—which is an unjust attempt, and an illegal exercise of his exclusive right, if he ever possessed such. From the affidavit, however, I am inclined to doubt whether he ever did. To exclude the jurisdiction of the Ordinary from the disposal of a pew, it is necessary, not merely that possession should be shewn for many years, but that the pew should have been built and repaired time out of mind.* Six years possession is not sufficient against a mere disturber, much less against the Ordinary.

A person, claiming a pew, must shew either a faculty, or prescription, which will suppose a faculty. But mere presumption is not sufficient, without some evidence, on which a faculty may reasonably be presumed. The strongest evidence of that kind, is the building and repairing time out of mind; for mere repairing for 30 or 40 years will not exclude the Ordinary. In this case the person was offered a particular space; and if he had built on it, it would not be sufficient to supersede the authority of the Ordinary. The possession must be ancient, and going beyond memory; and though, on this subject, I do not mean the high legal memory, it must be larger than appears in the circumstances of this case.

* *Stocks* v. *Booth*, 1 T.R. 428.

WALTER *v.* GUNNER and DRURY.

10th *July* 1798.

It is alleged that the house has been built eighty years, but it is not said that the seat was built and maintained by the owner of the house. The time of sixty years has been held not sufficient against a wrong doer. The law does not favor claims against the Ordinary, and no ground is stated here, on which such a right can be established against him. By Mr. *Retford*'s own affidavit, it appears that, whatever his claim might be, it ceased when he went out of the parish, and has since been used improperly. I have no hesitation in saying, that this is to be considered as a vacant pew, which the Ordinary has a right to confer, for present possession, on any inhabitant.

It is my duty, therefore, to decree a monition to issue to the Churchwarden to seat Mr. *Walter* in this pew. At the same time, as the parties have been acting under a mistake, which has been general in the parish, this must not be done with precipitation, but with all reasonable attention to the convenience of parties. I do not therefore grant this part of the prayer, which relates to the injunction of complying with this monition, before the 22d instant; but I direct the monition to be returned by the first session of next term, with the proper certificate.

GOLDSMID, BY HER GUARDIAN, *v.* BROMER.

17th *Dec.* 1798.

Jewish marriage invalid under *that* law, by reason of the *incompetency* of *witnesses*, required as an essential part of the ceremony.

THIS was a suit of jactitation of marriage, instituted, on behalf of Miss *Goldsmid* against *Bromer*, both parties being of the Jewish religion, on suggestion that the asserted marriage was not valid, by reason of non-conformity of the ceremony to the Jewish law.

JUDGMENT.

Sir *William Scott.* — This is a suit brought by *Maria Goldsmid* by her guardian, for jactitation of marriage against *David Bromer*, who confesses the jactitation, and justifies, by pleading a marriage to have been celebrated, and the same to be valid, according to the law of the Jews. The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided, for on the mere fact there is no question. The Jews, though *British* subjects, have the enjoyment of their own laws in religious ceremonies; and the marriage act acknowledges this privilege, by excepting them out of its provisions: To deny them the benefit of their own law, upon such subjects, would be to deny to a distinct body of people, the full benefit of the toleration, to which they have long been held to be entitled.

This being a question of Jewish law then, the Court must be content to learn that law, as well as it can, from the professors of it. It is not denied that some ceremony has been performed, but it is alleged, "*that the celebration was not con-*"*formable to the law of the* Jews." It is not alleged that

that the ceremony was defective in any other particulars, except "that it is essentially necessary "that it should be performed in the presence of "two witnesses, competent and credible, and "subject to no disqualification imposed by the "Jewish laws; which disqualifications may proceed from certain degrees of consanguinity to "either of the parties who marry, or from non-"conformity to the ceremonies of the Jewish "religion;" and it is alleged "that the ceremony "in this case was not attested by competent "witnesses according to these rules."

The allegation of Mr. *Bromer* refers to the present general law of the Jews; it is therefore now too late to refer the Court back to the law of *Moses* alone, as it existed in the earliest times of Judaism. He admits the objection of consanguinity, as affecting the competency of witnesses; but the distinction of which he avails himself is, — that it must be relation *ex parte paternâ*, whereas the witnesses objected to were related *ex parte maternâ* only; and that fact is not denied. He admits also the necessity of conformity; but with four limitations. — First, that any irregularity or breach of the Jewish laws, or ordinances, as pleaded, must be deliberate and designed, and not the mere effect of human infirmity, or negligence, or mistake. — Secondly, that it must be *unrepented of*: as otherwise it might have been absolved and done away by due penitence. — Thirdly, that it must be proved by witnesses, who are themselves unimpeachable. — Fourthly, that it must be a disqualification arising before the ceremony, and not subsequent to it. He does not, however, allege expressly that the non-conformity, imputed to the witnesses in this in-

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GOLDSMID *v.* BROMER.

17th *Dec.* 1798.

stance is within the exceptions which he has laid down, but takes the chance of what may arise on that point upon the interrogatories. It is to be observed also that the third limitation, which has been assigned, may be put out of consideration; for the only witness, who has been examined with regard to it, says, that it would not be necessary to ascertain the fact, by positive testimony, in favor of credit, for the law would presume, that the attesting witnesses were good and sufficient, if nothing was shewn to the contrary. To the fourth ground of objection, the different answers in the interrogatories allow the utmost latitude of advantage, if the state of fact is in any degree dubious; but, if no such doubt exists, the objection is peremptory; the imputed criminal act must not be an act resolvable into mere infirmity, negligence, or mistake. The *limitation*, which has been assigned on the alleged disabilities, must be proved by those who mean to rehabilitate; because, if a person does a criminal act, it must be presumed to be with a criminal intention, and that presumption will remain till the contrary is shewn. This will be more necessary, if it appears that the acts were accompanied with circumstances which shew no repentance, but a fixed and continued purpose of evil. There is also this further observation to be made, which is supported by Mr. *Ish Yemenc*, "that if one witness only is disqualified, it entirely "invalidates the ceremony," because there is then only one competent witness; and in this construction all the witnesses agree.

It appears, then, that the fact of marriage must be attested according to the Jewish law, and that this attestation is a constituent part of the validity

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of the ceremony. It is deposed to be essentially necessary, that both the witnesses must be competent; and I understand that if there was the clearest proof of the actual ceremony, it would not be sufficient, unless it was performed in the presence of such two attesting witnesses, of perfect competency. All the witnesses agree in this representation; I have therefore only to apply the law so certified to the facts; and, in doing this, I shall dismiss from my consideration much irrelevant matter, which has been introduced, particularly with respect to the conduct of the parties; because, if I understand the Rabbies correctly, if Miss *Goldsmid* was claiming the benefit of marriage, and the attesting witnesses were not competent at the time, the ceremony would signify nothing. Something has been said also of the undue interference of Mr. *Goldsmid* the father, for the purpose of setting aside this matrimonial union. But every parent is deeply interested in the welfare of his children, as affected by such connexions; and has a right to question a matrimonial contract entered into in the minority of his child; and I do not see that this right has been exercised, on this occasion, with any impropriety.

The young lady appears to have been of the tender age of sixteen, with all the inexperience, and susceptibility of hasty impressions, that are incident to that age; and it is the order of God, and the daily practice of society, that the experience of the father shall protect the inexperience of the child. It is said, that he is chargeable with inconsistency, in his manner of behaviour to this young man, as he had received *Bromer* into his family with great familiarity; but it never can be supposed that

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GOLDSMID v. BROMER.

17th *Dec.* 1798.

every man, who receives a person into his family, on a footing of civility, means that he should marry his daughter. It has been observed, also, that it would be to the disadvantage of the young lady, that the marriage should now be set aside; but the father has only to choose between calamities; he has a right to determine as he considers to be best for the interest and happiness of his family, and we must presume that he has so done. On the conduct of the young lady, I am unwilling to make any observation unfavourable to her, in consideration of her tender age. But as to Mr. *Bromer*, though much has been said of the honourable state of matrimony, it must not be forgotten, that it may be pursued on dishonourable motives; and though I do not say that it is so here, yet when a man, who is hospitably received into a family, avails himself of the opportunity of engaging, with clandestinity, the affections of a young lady, I do not think that he is a proper subject of lofty panegyric on that account.

I throw out of the case, also, all discussion on the reasonableness of the Jewish law, since I must take *that* as I find it. I must observe, however, that it does not seem to be without apology or reason, as I take the intention to be to render clandestine marriages almost impossible. Clandestine marriages are considered as *evils*, in all civilized societies. In *England*, they are discountenanced by the marriage act, and generally among Protestants. In many Catholic countries, also, the law interposes to prevent them. The law of the Jews, by its original incapacity of repeal, is out of the protection of the law of the countries in which they dwell, and it seems, therefore,

fore, to have done reasonably in providing, that if such contracts cannot be rendered null and void, by positive enactment; they shall be clogged with ceremonies, which render it almost impossible, that they should be effectually performed.

With these observations, I proceed to examine the facts of this case. On the 22d *November* 1795, it appears that the parties met by appointment, and Mr. *Bromer* took the lady in a coach to the *Shakespeare* Tavern, in *Covent Garden*, where two persons were stationed by him to be in readiness to be witnesses, though one appears also to have had other business there. In the presence of these persons he gave the ring, and pronounced the words in Hebrew which constitute the ceremony of Kedushim.

On this part of the case it has been contended, that the principal ceremony itself is not proved to have been rightly performed. But it is simple in its form, requiring only a few Hebrew words with the delivery of the Ring; and it is to be presumed, that a person, intending to effect such a purpose, would take care to instruct himself, in what was necessary to be done; and it is not material that the words should be understood by either party. This part of the case, therefore, is sufficiently proved by the witnesses, by the certificates of the Jewish Tribunals, by the answers, and by the very form of pleading, which lays the invalidity, in the disqualification of the witnesses alone. There is also the conduct of the parties in cohabiting, which may be taken as strong proof that some such ceremony has passed, as would justify such cohabitation; if it had not been for the objections that are now alleged, to the competency of these *two* witnesses, whose attestation

GOLDSMID v. BROMER.

17th *Dec.* 1798.

tion is an *essential* part of this ceremony. I say *two*, because if *one* is disqualified, there is an end of the business, as two are stated to be indispensably necessary *. The question then is reduced to this: Is either of these persons, before whom the ceremony is stated to have been performed, shewn to have been incompetent, not merely to attest, but to supply a constituent part of the ceremony? Mr. *Hesse* is accused of non-conformity. It is stated that he had profaned the Sabbath, by riding in coaches, and snuffing lighted candles, stirring the fire, and eating forbidden meats;—acts trifling to us, perhaps, who have no law applying to them, but not so according to the rites and ordinances of the Jewish religion. One witness, *Levi*, says, "that he had seen him "repeatedly, within these ten years, do these acts, "and that he remonstrated with him on such "occasions, but he replied, 'that he was no Jew, "but considered himself as bound only to the ex-

* In the treatise of *Maimonides, de connubiis Hebræorum*, c. 4. s. 6. it is laid down on the effect of witnesses, "Si quis sibi "mulierem dicaverit, uno duntaxat adhibito teste, nihil nos ejus "dicatio moveat, cùm ambo rem profiteantur; multo etiam minus "si quis dicaret, nullis adhibitis testibus. Si quis mulierem sibi "dicarit, adhibitis ejusmodi testibus, quibus Lege non est testi-"monii dictio, dicatio nulla fuerit; sin eos adhibet, quibus sapi-"entum autoritate non est testimonii dictio, aut quibus Lege sit "testimonii dictio, necne, non liquet, is, si velit eam uxorem "ducere, rursus coram idoneis testibus dicabit: Si nolit, repudii "libellus ab eo mulieri opus est, vel propter incertam Legem, "vel propter Sapientum certa vetita. Immo vero si dicationem "mulier factam esse neget, aut arguat mendacii testes, nihil-"ominus repudii libellum invita cogitur accipere. Atque eadem "est omnium dicationum incertarum ratio. Si velit eam uxorem "ducere, de integro firma dicatio fiet; si nolit, propter dubium "mulieri ab eo repudii libellus opus est."

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"terior observances of the religion, in compliance "with the wishes of his father.'" *

There cannot be a stronger instance of disclaimer of all observance of the regulations and ordinances of that religion, or, if I may so express it, of *an uncircumcised heart.* This then is sufficient,

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* In the responsive allegation, given in and admitted on the part of *Maria Goldsmid*, the 9th article pleaded "That, by the "Jewish law, a person is incompetent and disqualified to give "validity, as a witness, to any Kedushim or marriage contract "between Jews, or persons professing the Jewish religion, by "being related to either of the parties in the first and second "degree of consanguinity, and that, according to the Jewish "computation of the degrees of consanguinity, cousins german, "or persons descended from the same grandfather or grand-"mother, are considered as related in the second degree of con-"sanguinity, and that, in order to be a competent witness to the "ceremony of Kedushim, the person *must not only be a Jew, but* "*not be guilty of violating the religion and religious ceremonies of* "*the Jews; and a Jew, who is a non-conformist to the duties and* "*precepts of the Jewish religion, particularly in profaning the* "*Sabbath-day, and so proved to be by two credible witnesses, is not* "*a competent witness before whom Kedushim can be legally given.*"

10th, "That *Michael Abraham Levy*, one of the persons in "whose presence the aforesaid pretended Kedushim is alleged "and pleaded in the said allegation given in on the part and "behalf of *David Bromer*, to have passed between him and the "said *Maria Goldsmid*, is not, according to the laws and customs "of the Jews, a competent witness to give validity to any such "Kedushim or Jewish marriage contract between them the said "*David Bromer* and *Maria Goldsmid*, but, on the contrary, is "incompetent and disqualified by reason that he, the said "*Michael Abraham Levy*, is first cousin to *David Bromer*, re-"lated to him in the second degree of consanguinity, the mother "of *David Bromer*, and the mother of *Michael Abraham Levy*, "being natural and lawful sisters.

11th, "That *Emanuel Hesse*, the other person in whose pre-"sence the pretended Kedushim is alleged to have passed, is "not, according to the laws and customs of the Jews, a com-"petent witness to give validity to any Kedushim or marriage "contract, but, on the contrary, is incompetent and disqualified "by

cient, unless, as it has been contended by Dr. *Arnold*, a conviction is required to establish the incompetency. According to our own notions, founded on the principles of our law, an antecedent conviction might be necessary in the case of some criminal charges; but it is not alleged to be so in the Jewish law. So much for Mr. *Hesse*, whose disqualification is completely proved on the ground of non-conformity; and it disposes of the whole case, since, as before observed, *two* competent witnesses are required: It may be unnecessary

" by reason that he the said *Emanuel Hesse* hath manifested " himself to be a non-conformist to the duties and precepts of " the Jewish religion, particularly in profaning the Sabbath-day " in the presence of divers credible witnesses."

The nature of the evidence upon the 11th article of this allegation, may be collected from the depositions and answers of the following witnesses:—

Michael Abraham Levy, a witness examined on behalf of Mr. *Bromer*, to the 24th interrogatory, answers "that he hath a slight " knowledge of his fellow witness *Emanuel Hesse*; that the said " *Emanuel Hesse* is not a strict observer of his religion as a Jew; " that he knows not, but hath heard, that the said *Emanuel Hesse* " has *in divers instances and on several occasions* profaned the " Sabbath-day, and eat forbidden food in contravention of the " laws and precepts of the Jewish religion; that the respondent " once saw him *eat meat and butter together*, which is in con- " travention of the laws and precepts of the Jewish religion."

David Joseph Wertheimer, to the 11th article of the said allegation, this deponent saith "that he hath known the articulate " *Emanuel Hesse*, one of the persons in whose presence he hath " understood and believes the Kedushim or marriage passed " between the said *David Bromer* and *Maria Goldsmid*, parties " in this cause, for eleven or twelve years last past; that about the " time the deponent first knew the said *Emanuel Hesse*, he saw " him eating *meat in a tavern at Frankfort, known by the sign of* " *the Mulberry Tree*, which is a tavern *where the meat is not* " *prepared according to the laws of the Jews*; that about two " years ago the deponent saw the said *Emanuel Hesse eating meat*

" *among*

sary therefore to enquire minutely into the ground of objection to the other witness,—his relation to either of the parties.

On that point, Mr. *Ish Yemene* is the only witness produced by Mr. *Bromer*, and he is complimented for his learning. I cannot presume to judge upon the justness of that eulogium; but I think I may venture to say, that a want of learning does not appear to be the principal defect imputable to him in this cause; since he appears to be a Doctor of *rather* a loose school. I think I perceive something

" *among Christians in the Hercules Tavern* behind the *Royal Exchange, London*, which is also a tavern where *meat is not prepared according to the laws of the Jews*; that about a year and " a half ago the deponent saw the said *Emanuel Hesse profane the Sabbath-day* at the house of Mr. *De Fries, Basinghall Street, by snuffing the lighted candles on the evening of the Sabbath*; " that the foregoing actions are contrary to the laws of the Jews, " and the said *Emanuel Hesse* hath thereby manifested himself a " non-conformist to the duties and precepts of the Jewish religion, and a profaner of the Sabbath; that, by being guilty " of such actions, he hath rendered himself, according to the " laws and customs of the Jews, a witness incompetent and disqualified to give validity to any Kedushim or Jewish marriage " contract."

To the 6th interrogatory, he says, " That committing murder, " blasphemy, eating forbidden food, and profaning the Sabbath, " by *kindling, extinguishing*, or *stirring* a fire, or *snuffing candles*, " or *riding out on horseback*, or *in a carriage, on the Sabbath-day*, " are the principal acts by which a person becomes disqualified " according to the laws and customs of the Jews to be a competent witness to give validity to any Kedushim or Jewish " marriage contract."

To the 10th, " that he was subpœna'd, and did attend as a " witness at the trial at *Guildhall*, in an action for Seduction, " brought in the Court of Common Pleas, by Mr. *Goldsmid* " against Mr. *Bromer*; that he stood at some distance, and there " was so great a crowd; that he could not distinctly hear all that " was said; that he recollects one ground of objection, but

" whether

GOLDSMID *v.* BROMER.

17th *Dec.* 1798.

thing of Sadducean laxity in his opinions, both in this and in the former cause; which detracts a little from the respect which might otherwise be given to his erudition; for I cannot forget that in the former case he had said, that Kedushim, without consummation, was perfect marriage—Now he

"whether the only one or not he cannot say, there taken to the "competency of *Emanuel Hesse*, was on account of his having, "as well before as after his being a witness to the marriage in "question, *eaten pork*."

Henry Leo says to the 11th article of the allegation, "that he "well knew *Emanuel Hesse* about fifteen years ago at *Frankfort*, "and that he, at that time, heard him publicly declare, *that he*, "*Emanuel Hesse, did not consider himself as a Jew, and if it* "*were not for his father, that he would renounce that religion;* "*that for about these last ten years he hath been well acquainted* "*with said Emanuel Hesse in London, and hath repeatedly seen* "*him profane the Sabbath-day by riding in coaches on that day,* "*and hath seen him repeatedly, on the Sabbath-day, at the Anti-* "*gallican Coffee-house, stir the fire, and snuff the lighted candles;* "that, by such acts he hath manifested himself to be a *non-* "*conformist,* &c."

To the 4th interrogatory this respondent answers, "that he "hath, *times without number, remonstrated* with the said *Emanuel* "*Hesse* when he saw him do any act which he considered incon- "sistent with the laws and customs of the Jewish religion; that "he does not recollect in whose presence he so remonstrated "with him; that the answer the said *Emanuel Hesse* returned "usually to such remonstrance was, that he did *not profess him-* "*self to be a Jew;* that he hath known him, after such re- "monstrance, repeat the wrong-doing."

Gabriel Cohen and *Jacob Hart* say to the 11th article of the allegation, "that, on the 9th day of *December* 1795, as he went "into the *Stock Exchange* Coffee-house, near the *Royal Exchange*, "which is a public coffee-house, and eating-house, where food is "not prepared according to the laws and customs of the Jews, "he saw the said *Emanuel Hesse eating part of a round of beef* "*with sauce, appearing to be melted butter,* in the public coffee "room, in the presence of divers persons; that, by so doing, "he, *Emanuel Hesse*, manifested himself a non-conformist to the "duties and precepts of the Jewish religion, which forbids his "eating in such manner."

says

says *otherwise.* The Talmud, according to Mr. *Ish Yemene*, is an overruling authority, to which the authority of *Maimonides* and other expositors must bend. In the ninth interrogatory, he is pressed by passages from the Talmud, which, he admits, go to disqualify the mother's relations,—the question is put, "whether relation *ex parte* "*maternâ is* not as much a disqualification as *ex* "*parte paternâ?*" and I understand it to be a direct declaration of the Talmud, *that father's father* is to be applied, on this disqualification, in the corresponding style of *mother's mother.*

There is also an extract from Tur, a book of high authority, to the same effect, that *sister's sons* are under the same disqualification, *as brother's sons.* But Mr. *Ish Yemene* goes on to say, "that *Maimo*-"*nides* has stated a different opinion." To this I must reply, what Mr. *Ish Yemene* said before, that where the Talmud is plain, the authority of *Maimonides* must yield to it. I must therefore remember that if *Maimonides* expresses a doubt, and the Talmud *none;* where the Talmud is on one side, and *Maimonides* on the *other*, although I will not say that so eminent a scholar as *Maimonides* was in error, I am bound to prefer the authority of the Talmud. On these grounds, therefore I am of opinion that the other witness is incompetent, on account of his relations *ex parte maternâ.*

The case however does not rest here. I have also the judgment of the college of *German* Jews, to which community the party particularly belongs,—the sentence of the Bethdin, their chief tribunal—and this judgment has been submitted also to the college of *Portuguese* Jews, who concur in it. Here then are *Courts* of great authority on this

GOLDSMID v. BROMER.

17th *Dec.* 1798.

this point, and on matter of Jewish law, entitled to the greatest respect, as they are *Tribunals*, whose certificate of *the foreign law*, must be received as most satisfactory, though perhaps their judgment is not equally satisfactory in matters of fact. Here is a question compounded of *law* and *fact*, and though the decision may not *bind* the Court, which has to try the fact for itself, it conveys the best information which It can obtain of the principles of law that are to be applied to it. They certify that they have found the marriage null, according to the law of *Moses*, without giving specific reasons for it. This defect however is, in some measure, made up, by the information which they have given in their examinations. I there find the grounds assigned, on which I form the same opinion.

This is the opinion that is to be collected on the legal merits of the case; and I see nothing in the moral estimate of the conduct of the parties, which inclines me to entertain a different sentiment. I therefore pronounce against the validity of the marriage, pleaded by Mr. *Bromer*; that he has failed in proof of the allegation in justification, and that *Mary Goldsmid* is not his wife,—but I give no costs.

The Counsel prayed the Court, in addition to its sentence, to enforce perpetual silence, meaning to pray the same monition to the party as was prayed in the case of the Duchess of *Kingston* *. The Court said, It would decree it, if prayed.—Sentence accordingly.

Affirmed, on appeal, *Arches*, 25th *June* 1799. *Delegates*, 19th *November* 1800.

* Consist. *Chudleigh* v. *Hervey*. 10th *Feb.* 1769.

HORNER *v.* LIDDIARD, OTHERWISE WHITE-LOCK, FALSELY CALLING HERSELF HORNER.

24th *May* 1799.
Consent of *Parents*, under 26 *Geo.* 2. c. 33. s. 11. not applicable to the marriage of *illegitimate* minors.

THIS was a case of *nullity* of marriage, brought by the husband against the wife, by reason of the minority of the wife, *who was illegitimate;* and the want of consent, as required by the Marriage Act.

These facts appeared:—*Harriet Liddiard*, otherwise *Whitelock*, was the natural daughter of *Sarah Liddiard*, by *John Whitelock*, Esquire, and was born on the 12th day of *September* 1777. Mr. *Whitelock* died in the year 1788, and by his last will, bearing date the 30th of *April* 1787, in which he appointed *Sarah Liddiard*, and *George Ashley*, since deceased, his executors, he acknowledged *Harriet Liddiard*, otherwise *Whitelock*, as his natural child; and bequeathed certain parts of his personal property to his executors upon trust, to put the same out at interest, until *Harriet Whitelock* should attain the age of twenty-one years, or be married, with the consent and approbation of the said *Sarah Liddiard* and *George Ashley*, or the survivor of them; the interest, meantime, to be laid out in her board, maintenance, clothes, and education; and to pay her the whole when she should so attain the age of twenty-one years, or be married with such consent; and it was his will and desire, that all possible care should be taken of the said *Harriet Whitelock;* and he gave the tuition and care of her to *Sarah Liddiard* and *George Ashley*, during her minority.

 On

HORNER v. HORNER.

24th *May* 1799.

On the 7th day of *March* 1796, a marriage was solemnized between *Thomas Strangeways Horner*, Esquire, and the said *Harriet Liddiard*, otherwise *Whitelock*, by virtue of a licence, under seal of the Consistory Court of the Lord Archbishop of *Canterbury*, wherein *Harriet Liddiard*, otherwise *Whitelock*, is described as a minor; and wherein it is stated, that the marriage was solemnized by and with the consent of *Sarah Liddiard*, there stiled *Sarah Whitelock*, widow, her mother and guardian, and which consent was in fact obtained.

In *February* 1799, a suit was instituted by Mr. *Horner*, in the Consistorial Court of *London*, against *Harriet Liddiard*, otherwise *Whitelock*, falsely calling herself *Horner*, spinster, and pretending to be the wife of the said *Thomas Strangeways Horner*, to obtain a sentence, pronouncing and declaring the said marriage to have been null and void, pursuant to the act of the *twenty-sixth year of King George the Second*, chapter the thirty-third, usually called *the Marriage Act*, which enacts, in section the eleventh, "that all marriages, solemnized by licence, where either of "the parties, not being a widower or widow, shall "be under the age of twenty-one years, which "shall be had without the consent of the father of "such of the parties, so under age (if then living), "first had and obtained, or if dead, of the guardian "or guardians of the person of the party so under "age, lawfully appointed, or one of them; and in "case there shall be no such guardian or guardians, then of the mother (if living and unmarried), or if there shall be no mother living "and unmarried, then of a guardian or guardians

" of the person appointed by the Court of Chan- " cery; shall be absolutely *null and void* to all " intents and purposes whatsoever."

After the usual proceedings, the cause came on for hearing, upon the fourth session of *Easter* Term, the 8th of *May* 1799.

On the part of Mr. *Horner*, it was contended by the King's Advocate and Dr. *Swabey*, that some consent is necessary to the marriage of minors; and the question is, who are the persons competent, by the act, to give that consent? Illegitimate fathers and mothers are not within that part of the statute of the 26 *Geo.* II. c. 33. s. 11., which requires the consent of parents to the marriage of their children under age; and therefore no person can give a valid consent, in the case of illegitimate minors, but a guardian appointed by the Court of Chancery, under the last clause of that section of the act. Illegitimate persons are said, by our laws, to be *nullius filii;* illegitimate parentage constitutes no civil character, and there is no instance in which natural consanguinity is considered in matters of mere positive institution. The moral relation may have its effect in prohibiting incestuous marriages between persons so connected; as a man cannot marry his natural sister: But it does not extend itself to consequences merely civil. It is a perfect nullity with respect to inheritances both real and personal, which devolve to the Crown by reason of the incapacity of natural children to succeed to them. It has been decided, that a natural father cannot appoint a guardian to his children, though in such cases, it is the usual practice for the Court of Chancery to appoint the same person who has

 been

HORNER v. HORNER.

24th *May* 1799.

been nominated by the parent *. This was done in the case of *Harford* v. *Morris* †. Before the statute of the 18 *Eliz.* the natural father was not bound to maintain an illegitimate child. There is no instance in which the words "*father*" or "*mother*," simply used in any statute, are applied to any other than legitimate parents. In 2 *Bulstrode* 344, on the act of 43 *Eliz.* c. 2. s. 7., the words "*father and grandfather*" have been held not to extend to illegitimate fathers and grandfathers: and in those statutes which expressly relate to them, the qualifications of putative, or reputed, father or grandfather, are usually added.

The consent of parents to marriage being of mere positive institution, and not a moral, but a civil act, the terms must have the same interpretation here as in other statutes: and the word father must be referred to the general phraseology of the law. A different rule would lead to great difficulties and absurdities. How was the father to be ascertained? Different persons might claim. If the mother was dead, who could decide the dispute? It might be observed also, that on the contrary interpretation, if the father was dead, the illegitimate mother would have a greater authority than a lawful mother; because the father could not appoint a guardian to displace her. If the rule of *partus sequitur ventrem* were to be adopted, the mother would be preferred to the father. It appears, from the terms of the act of parliament, that the legitimate father only is meant by the order in which it is arranged. For after the father, the act mentions, the guardian lawfully appointed; whereas it had been decided that an

* *Ward* v. *St. Paul*, 2 *Brown*, 583.

† Arches, 2 *December* 1776. Deleg. 1778.

illegitimate father cannot appoint. This interpretation is universally adopted in practice. If illegitimate parents should attempt to forbid the banns, they cannot stand up in the Church to acknowledge an offence, for which they are liable to punishment. No suit is ever brought here by the *illegitimate* father for nullity of marriage; though the *legitimate* father is considered as having such an interest in his child, as entitles him to institute a suit for that purpose, in his own right. In granting licences also the consent of the natural father is never required. The Court of Chancery, in such cases, appoints guardians to consent. The affidavit, upon which licences are obtained, mentions only the lawful father, and these forms were settled by the authority of persons high in the profession.

HORNER *v.* HORNER.

24th *May* 1799.

It may be said, that there are cases in the temporal courts which have adopted a different construction; but, if they are examined, they will not warrant that conclusion. In the case of The King *v. Edmonton*, 2 *Bott*, 85, Mr. Justice *Buller* observed, "that it was not necessary, to give a "decisive opinion upon the construction of the "marriage act." Mr. Justice *Willes*, who thought otherwise, says, "as to the construction of the "marriage act, it ought in this case to be liberal. "We are warranted in considering a putative "father as within it, by the case of The King "*v. Cornforth*, 1 *Bott*, 459 *, where the expression "in the statute of *Philip* and *Mary* is similar to "that in the marriage act." So Mr. Justice *Ashhurst*. "The case of The King *v. Cornforth* is "stronger than the present, and authorizes us to "put that construction on the marriage act." This

* 2 *Strange*, p. 1162.

HORNER v. HORNER.

24th May 1799.

judgment therefore stands upon the former case of The King *v. Cornforth;* but if that case is accurately considered, it will not support that construction.

It was a motion for an information, upon the statute of the 4th & 5th of *Philip* and *Mary,* c. 8. for taking away and marrying a natural daughter of one *Bohun,* who was but fifteen years old. The information was granted upon the third section, which forbids taking away any woman child from the possession, not only of the father or mother, but of any person who shall happen to have, by any lawful ways or means, the order, keeping, education, or government of such child, It is clear, that the information was granted, not upon the second section, which relates to parents only, but upon the third section. For Chief Justice *Lee* says, " It is not necessary for the Court " in this case to give any judgment upon the fact, " whether legitimate or not, neither is that the " point in issue, but the taking her from the pos- " session of a person having by lawful means the " possession of her." And Mr. Justice *Chapple* said—" If it had rested singly on the second " section, I should have had some difficulty; but " it is plain from the second and third taken to- " gether, that they intended to take in different " cases, so that they are quite distinct, and whether " legitimate or not, will not be material." And Mr. Justice *Wright* to the same effect.

It is submitted, therefore, that there is no case in which the Temporal Courts have decided contrary to the judgment of this Court in the case of *Foster* v. *Lawrence* * : If they had, the question of

* Consist. 26th *January* 1793.

Horner v. Horner.

24th May 1799.

of the validity of marriages is of the peculiar and exclusive jurisdiction of the Ecclesiastical Courts. The authorities, however, all concur.—There is that decision of the Ecclesiastical Court, and the opinion of Mr. Justice *Blackstone* in his Commentaries, and the practice of the Ecclesiastical offices, which is material to shew the opinion of these Courts at the time. If it were otherwise, the Court of Chancery could not appoint a guardian till the mother was dead. And if it should be established, that the mother is competent to give the consent required by the statute, every marriage had under a guardianship appointed by Chancery, whilst the mother was living, would be null.

On the other side Dr. *Arnold* and Dr. *Lawrence*, in support of the marriage, submitted, that the marriage act requires the consent, first of the father, next of a guardian by him appointed; thirdly, of the mother. In this case there were no persons answering to either of the two former descriptions. There was however a mother, and her consent was obtained in the most formal manner. But it was objected, that she is not a person who is competent to consent; and the question is, whether the terms father and mother in the statute, which are used without any words to limit their meaning, extend to illegitimate, as well as to legitimate, parents.

It is said, that in other statutes, especially those relating to the poor, the terms are restrained to the lawful father and mother: But those statutes respect only matters of property or police, which are of positive institution and municipal regulation. In laws relating to such points, the names of consanguinity may include only such relation, as is

HORNER v. HORNER.

24th *May* 1799.

contracted according to the regulations of the country. But marriage is not merely of positive institution; and, with respect to it, consanguinity is always considered as it exists by nature, and connections are forbidden between those related by blood and nature, as well as those who are so likewise by law. The terms used in any law are to be interpreted in the same sense in which they are used, on other occasions, on the same subject. In a statute therefore relating to marriage, the terms of consanguinity must include natural as well as legal relations.

Illegitimate minors are equally within the policy and intention of the act. They are as much in want of the care and protection of their parents as other children.—It has been decided that they are within the provisions of the statute, so far as to make consent necessary for their marriage. In the case of The King v. The Inhabitants of *Hodnett* *, Mr. Justice *Buller* says, "The words of the "marriage act are very general. It speaks of all "persons, except under particular circumstances. "Then do illegitimate parents come within any of "these exceptions? If they do not, they fall under "the general regulations established by the act." If this point had been determined by this Court in the case of *Foster* v. *Lawrence*, it would have been presumptuous to argue it again; but the Court itself has intimated that it was not decided. That judgment went on another ground—that there was no consent whatever. This point however has been expressly decided in the case of The King v. The Inhabitants of *Edmonton*, a settlement case, in which the whole cause depended

* T. R. vol. i. p. 96.

upon

upon it.—The King *v. Cornforth* shews, that the natural father has the lawful custody of his children. The opinion of the Court of King's Bench in these cases is entitled to the greatest attention. For though the Ecclesiastical Courts have the sole cognizance of the validity of marriages, yet it is generally held, that if statutes are made upon such points of exclusive jurisdiction, the Courts of Common Law have a right of issuing a prohibition, if this Court varies from those Courts, in the interpretation which it puts upon them.

An illegitimate parent must be presumed to pay more regard to the interests of the child than a mere stranger, to whom the power of consent must otherwise be given by appointment of the Court of Chancery. It is said to be the practice of the Court of Chancery to appoint guardians in such cases. But they usually are appointed on application *ex parte;* and no case is mentioned in which the circumstances have been brought fully to the notice of the Court.—It is said likewise to be the practice of the Ecclesiastical Courts, not to require the consent of an illegitimate parent, on granting licences.—But these licences also pass on the application and representation of the party; and no instance is mentioned, in which the circumstances of such a case were brought to the notice of the judge of any of these Courts. In the present case, the mother was appointed guardian by the will of the father; he expressly authorized her to consent, and a considerable part of the fortune of the daughter was made to depend upon that consent.

JUDG-

HORNER v. HORNER.

24th *May* 1799.

JUDGMENT.

Sir *William Scott*.—This is a proceeding by *Thomas Strangeways Horner*, Esquire *v. Harriet Liddiard*, otherwise *Whitelock*, described as spinster, to obtain a sentence of nullity of marriage by reason of minority; the party against whom the proceedings are had, being illegitimate, a minor, and having been married by licence, with no other consent than that of her natural mother.

The facts undertaken to be proved are—*first*, the date of the birth of the party—*secondly*, the illegitimacy of the birth—*thirdly*, the date of the marriage—*fourthly*, that the marriage was had by licence, not by banns, and on the consent of the mother only—and, *fifthly*, that no guardian had been appointed previous thereto—from whence it is inferred that the marriage is null and void, as not being supported by a legal and effectual consent.

It has been admitted, that the facts, from which this legal conclusion is to be deduced, are sufficiently established. The date of the birth, and the illegitimacy, are proved by the natural mother. They are proved likewise by *Anne Ashley*, who was present at the birth of *Harriet Liddiard*, otherwise *Whitelock*, and afterwards at her baptism; and by another person of the name of *Charlotte Mildenham*, who is the natural sister of the party. There is also an entry of baptism, upon the 12th of *November* 1777, in which she is described as being base-born. The *third* and *fourth* facts, namely, the date of the marriage, and that it was a marriage by licence (with the consent of the natural mother only), are proved by the mother herself, and by *Robert Walker*; and it appears to have been solemnized upon the seventh of *March*

1796.

1796. These facts are proved likewise by the affidavit to obtain the licence, and by the entry of the marriage. The *fifth* fact, which is undertaken to be proved, that there was no appointment of a guardian, is established by Mr. *Stevenson*, who is a Solicitor in the Court of Chancery, and *Aaron Collingbourn*, who have searched the records of the Court of Chancery from *Hilary* Term 1777 to *Trinity* Term 1796, in which period no appointment of a guardian occurs, and if it existed at all, it must have been found amongst these records.

The facts, therefore, upon which the parties rely, are fully established, and the only question is, whether the conclusion of law is rightly deduced. That question arises upon the act of parliament, which has made certain other consents necessary, besides the consents of the contracting parties themselves. These additional consents are those of the parents or guardians, according to the different circumstances of the case. *First*, the consent of the father. *Secondly*, of the guardian, appointed by the father. *Thirdly*, if the father is dead, and no guardian is appointed by him, the consent is in the surviving parent, if she is unmarried. And, *lastly*, the consent of a guardian appointed by the Court of Chancery.

So far as the consent of parents or guardians is absolutely required, the act of parliament has introduced a new rule. The consent of parents was not required *de necessitate* to the marriage contract, in its own nature, as understood by the law of this country, or by its religion, which mixed itself much in the consideration of this subject. It was indeed a consent highly desirable to be procured, from motives of piety and filial reverence, from

HORNER v. HORNER.

24th *May* 1799.

from motives of prudence and of family convenience and propriety; but the obtaining it was a duty, though of high, yet of imperfect obligation only. The want of such consent was, as the ecclesiastical lawyers expressed it, an *impedimentum impeditivum*, an impediment, which threw an obstruction in the way of the celebration of the marriage, but not an *impedimentum dirimens*, an impediment, which at all affected the validity of the marriage, if it was once solemnized. As to the consent of guardians, it does not appear to have been much thought of, except in certain feudal relations, where the power of guardians was carried to a very extravagant length, and for purposes pointing almost entirely to the interest of the guardians themselves.

The marriage act extends its regulations to the marriages by licence of all persons whatever, with the exception of a few cases, amongst which the case of bastards is not included; at least not *nominatim*. They are therefore necessarily included under the regulations of the act, unless they are out of the reason and policy upon which it is founded. But they are clearly within the reason and policy of that act; illegitimate minors may have property which requires to be defended; in all cases, they have their persons and their personal happiness in life; and it is fit that their personal happiness should be protected by experience and prudence greater than their own.

Accordingly, the Court of King's Bench has decided, in the case of The King *v.* The Inhabitants of *Hodnett* *, that illegitimate children fall

* Vid. ante, p. 344.

under

under the general regulations established by the act. The opinion of the Ecclesiastical Court was expressed in the case of *Foster* v. *Lawrence* *, and the marriage was declared void upon one or both of these grounds, either that the additional consent was not proved to have been given, or, if it was, that it was not the proper additional consent. It is so considered, likewise, by the Court of Chancery, in the appointment of guardians to consent to the marriages of bastards.

The necessity, therefore, of an additional consent, is universally recognized by all the Courts in the kingdom. The only question is, what is the proper additional consent, in the case of such persons? Now it appears to me, that the Court of Chancery has answered that question, ever since the passing of the act, by its uniformly appointing guardians to bastards, although the father and mother were living. This universal practice certainly expresses the opinion of that Court, not only that bastards are within the act, but that the reputed parents cannot give the consent required; for, if they could give that consent, the Court of Chancery would only have appointed a guardian, when the father had died without nominating a guardian, and when the mother was dead or married again. But it is not so. The Court, therefore, considers these persons as included in the act; but that it has placed them under the last description only, of those who have neither father, nor guardian lawfully appointed, nor mother. It applies the first regulations only to legitimate children, as they only can have a father, a mother, or a testamentary guardian. And the Court of Chan-

* Vid. ante, p. 342.

HORNER v. HORNER.

Chancery has constantly, as I have understood, acted upon this construction.

24th *May* 1799.

The Ecclesiastical Court has followed the Court of Chancery, in adopting that construction; and it has always refused to grant licences, upon the mere consent of the natural father or mother, and unless it is stated that they are likewise the lawful father or mother. I have always understood that the form of the affidavit, upon which licences are now granted, was originally settled, at the time of passing the act, upon great advisement and consideration, by eminent lawyers of both professions.

In the case of illegitimate minors, during the lives of their parents, the constant course has been for guardians to be appointed by the Court of Chancery, whose consent has been supposed to render their marriage valid. Many marriages exist in this country, which have taken place in this manner, and they are all void, if this is not the true construction of the act; because they have been had without that consent of the parents, which the act otherwise would make necessary to sustain their validity.—If it is argued, however, that this is an improper construction;—The objections, independent of all authority upon the subject, must arise, either, in the *first* place, from general principles, shewing that another construction is necessary or expedient to be adopted; or, *secondly*, from the context of the act itself; or, *thirdly*, from a different construction of the same expressions in other statutes in *pari materiâ*. In the *first* place, I presume that it is to be admitted, that the father and mother intended by the act, are to be the father and mother *ejusdem generis*, they must be both parents of the same description; not a legal father and an illegal mother.

mother. Now, on all general principles, it is perfectly clear, that the only father, whom the law of the country has armed with the *patria potestas*, is the father "*Quem Nuptiæ demonstrant.*" He only is the guardian of his child by law, and he only may delegate that trust to another at his death.

The only cases in which the natural parent is acknowledged, are cases to his disadvantage, in cases of civil concern, or by way of restriction, in such as are of a moral nature. He is compelled by later statutes to maintain the child, for the relief of the parish, to ease it of the charge to which it is primarily liable, because, before these statutes, the parish alone was bound to maintain it. It is laid down in 2 *Bulstrode* 344, and *Bott* 460, that before the statute of the 18th *Eliz.* c. 3. the parish, where the child was born, must maintain it till it gained a settlement. The custody of the child, therefore, must have been at that time in the hands of the parish, he was *filius populi*, and there was no ground upon which the possession of the child, could have been assumed by the father. Even since the enactment of that statute, it continued for some time a matter of no inconsiderable doubt, whether the parent had a right to take the child out of the possession of the parish. In the case of *Newland* v. *Osman*, *Bott* 460, there was the opinion of three judges of the Court, that the father, under such circumstances, agreeing to maintain the child, had a right to the possession, and they referred to *Saunders*'s Reports*. But I find that Mr. Justice *Foster* says, "I am not so "clear in these points. I think the case of "educating bastard children is not to be con-

* *Richards* v. *Hodges*, vol. 2. p. 83.

"sidered

Horner v. Horner.

24th May 1799.

" sidered as a burden to the parish but as a trust; " and that it should not be easy for fathers to take " them out of such care and custody; the statute " is express, that the justices shall order the father " to contribute to the parish for the maintenance " of the child. Though it is not to be supposed " that fathers will destroy their bastard children, " yet they may look upon them as a burden and " a shame, and therefore either neglect them, or " put them in improper hands. The resolutions " and orders of justices of the peace have been " grounded upon this, not for requiring security " till the child come to a certain age, but because " the order extended the age too far; therefore I " am not so clear. The case in *Saunders* was " only his own opinion." — Certainly if so eminent a person expressed himself in such a way, it is enough to warrant a conclusion that it continued to be a matter of some doubt, long after the passing of that statute, whether the natural father had a right to the custody and possession of his child against the parish.

Though this may now be settled, still he can appoint no guardian; and, I presume, that he cannot legally take the child out of the custody of the mother, in which it is deposited by nature at its birth; though I speak with all necessary caution on a point belonging to the learning of another profession. All this is sufficient to shew that he has the principal burden of maintenance, with a very small degree (if any) of parental authority.

According to the general policy of the law in matters merely moral, a person is said to be restrained from marriage with illegitimate relations, as much as with legitimate ones; because the rules of prohibition

hibition of marriage arise out of natural relations; and though these rules (as received by our law) are perhaps carried further than might seem necessary, on mere moral and natural grounds, so far as they can be exactly ascertained by mere reason, yet, as they are taken from the law of God, and have one common origin therein, they are all considered as of the same moral nature and obligation. It is however to be observed, that even this matter does not appear to have yet received a final decision; because I see that in the case of *Hains v. Jeffel* *, the cause was adjourned, and therefore no decision was given upon the question; although undoubtedly the Ecclesiastical Court, the proper forum on questions of that nature, conceived that that marriage came within the reach of the prohibition.

But taking it to be sufficiently settled, as I conceive it is, that moral restraints do attach upon natural consanguinity, yet certainly it is not to be asserted, that the absolute necessity of parental consent to the validity of the marriage contract is considered, in law, as of more than of positive and civil institution. Nothing belongs to the validity of that contract naturally, (as far as it has usually been considered and treated by most human laws), but the consent of the parties themselves, if they are of an age capable of executing the duties of that contract. I desire to be understood as advancing nothing upon the question whether human laws have considered this matter rightly: I only assert the fact, that they have so considered it. For nothing can be more clear than that, by the universal matrimonial law of *Europe* before the

* 1 Ld. *Ray*. p. 68.

 Reform-

HORNER v. HORNER.

24th May 1799.

Reformation, the consent of parents was not required *de necessitate* to the validity of the contract. Upon this footing, the matter continues in every country of *Europe* holding communion with the Church of *Rome*, except where regulations merely civil have, in later times, introduced a novel and peculiar law upon the subject. Upon this footing, the matter remained in many Protestant states after the Reformation; it so remained amongst ourselves till the time of the marriage act; and nothing can more clearly shew than that very act, how much human law is in the habit of considering the interposition of the parent's consent as of civil institution only. The power is given to one parent exclusively; upon his death it does not survive to the other parent, but it is given preferably to any stranger whom the deceased parent has thought fit to nominate, and it devolves to the surviving parent only, in defect of such nomination. If it does so devolve to her, it continues with her only during widowhood; for her second marriage, though it does not at all affect her natural character of parent, puts an entire end to her legal right of consent to the marriage of her child, and transfers it to the public magistrate. Nothing can more satisfactorily prove how much the matter has been treated and moulded as under the entire dominion of mere civil prudence. — As to the necessity of the consent of any guardian, it is sufficient to observe, that the office itself is a mere creature of civil institution.

So much then as to the general analogies of the law, with respect to the rights it has vested in parents, and the capacity which it has given to children.

Let us next look at the context of the act to see what is to be deduced from thence.

First, the marriage of minors is to be had with the consent of the father. Of what father? I take it clearly to mean of the legitimate father and him only; for it follows, *secondly*, the consent of a guardian lawfully appointed. But how appointed? I presume by the father, under the act of parliament, which gives him that power. For there are only two modes of appointment known to the laws of this country; by the father, under the statute, and by the Lord Chancellor. Now the guardian, appointed by the Court of Chancery, is not introduced till a later stage, where he is particularly described. Consequently the guardian, here spoken of, must be the guardian appointed by the father; and the father who is mentioned, must be he who can appoint a guardian; but it is admitted that that power belongs only to the lawful father. The father therefore spoken of before, must be that father, and that father only. In the *third* place, the consent of the mother. If the natural mother is to be understood, she would have more authothority than a legal mother, because the right of giving consent does not devolve upon the legal mother, till in the third instance, *viz.* in case of a defect of appointment of a guardian by the father. But the natural mother would be entitled to give a valid consent in the second instance, as the natural father can appoint no guardian.

If the illegitimate father is to be considered as capable of giving a valid consent, is it every illegitimate father? certainly not; because, in many cases, no satisfactory evidence can be given of paternity. What evidence is to be required to

 establish

HORNER v. HORNER.

24th *May* 1799.

establish that point? Not his own testimony; because a man cannot be allowed, upon his own claim and assertion only, to make his consent necessary to the marriage of another person. Or is it to be proved by the filiation, in the manner directed by the act of parliament, for the special purpose of ascertaining the settlement of the child?

Supposing that this evidence, which the law has provided for the special purpose of exonerating the parish, and for that purpose only, as far as appears, is to be borrowed and applied to this purpose, it will not answer the exigencies of many cases; it would not in the present case, where no such filiation has been proved, or, I presume, can be proved. But, supposing such filiation, what sort of paternity is acquired by it? In the language of the statutes, he is stiled the *putative* father, he is still recognized only as a father by mere reputation? Is it then to be asserted, that this right of giving consent belongs to every father who is so merely by reputation? If that is to be admitted, can any thing be more uncertain, any thing more lax, to serve as the foundation of a right of this nature? In what manner, and on what proof, is the licence to be granted, if it is not to be granted to every such father? In what way is it to be shewn at the time of granting that licence, that he has that popular repute in the requisite decree? Is the acknowledgement of the party, the maintenance and education of the child, to be called in in aid? If the mere affidavit of the father is not sufficient for the purpose, in what way is that evidence to be obtained? Or is a licence to be granted, leaving the question of the validity of the marriage open to future discussion, and to the

9 chance,

chance, that if any dispute arises, evidence may be obtained to prove the acknowledgement, the maintenance and education, and the general reputation? Can such a licence with propriety be granted?

Now let us see what are the rules of law upon the construction of statutes in *pari materia*.

I take it to be universally true, almost without any exception, that, in all other acts of parliament, the title of father belongs only to him who becomes so in the manner known to and approved of by the law. Every other father, in the language of the law, is only a father by repute, of an illegal and disreputable character; a character not of honour and reverence, but of discredit and shame. In all other statutes, relating to the civil rights of father and child, they are the father and child known to and recognized by the law. — When it is considered that this is a statute which gives strong privileges to parents, privileges unknown to the ancient law of the country, what reason is there to presume, that, in this single statute, the words should have a larger construction, in order to communicate such important rights to persons to whom the law does not, in other cases, give any? and who bear the title of parents, not as a title of honour and privilege, but of discredit and disability? Nor is it necessary on account of the minors themselves, since they cannot fail to find that protection, which it has been the wisdom of the law to provide, in the appointment of a guardian, by the authority of the Court of Chancery.

Attending thus to the universal policy and morality of the laws, to their language in general, and to that which is especially used in this act, I cannot but be of opinion, that it was the intention of the legislature, *dare jura maritis* only, to

 give

HORNER v. HORNER. give a power to lawful parents alone; and that natural parents, though parents *de facto*, are not
24th *May* 1799. the parents intended by the act. — So much for the question upon principles; how stands authority upon the matter? In the first place, private authority speaks negatively at least to this effect. Mr. Justice *Blackstone*, it is observable, where he treats of the peculiar powers of legal parents, expressly mentions this consent as belonging to them *; when he speaks of the power of natural parents it is not then enumerated, though it must have occurred to him; and therefore it is to be inferred that, according to his judgment, it is a power which belongs to one description of parents only.

I observe that the learned Editor of the last edition of The Commentaries has laid it down, that it has been decided, "that if a bastard marries "under age by licence, he must have the consent "of his putative father, guardian, or mother, ac-"cording to the statute." † If the observation is to be understood according to this arrangement, I cannot agree that it has been so decided. For what guardian can be so interposed between the natural father and mother?

As to public authority, there has undoubtedly been a decision of a very high Court, which has created the only difficulty presented to my mind upon the subject; I mean the case of The King *v.* The Inhabitants of *Edmonton* ‡; for the case of The King *v.* The Inhabitants of *Hodnett* established no more than that natural children are within the provisions of the act. But, in the case of The King *v. Edmonton*, I cannot deny that the present question did arise; and I am as little disposed to

* Vol. 1. c. 16. p. 452. † Vol. 1. p. 458. n. 11.
‡ Vid. ante, p. 341.

deny,

HORNER *v.* HORNER.

24th *May* 1799.

deny, that the express decisions of the Court of King's Bench, in the interpretations of statutes, even *in re ecclesiasticâ*, are authorities of a very binding nature. But I hope I may, without violating that reverence which I owe to such an authority, permit myself to observe, that it is a case which stands single — that it is in that class of cases which are usually considered as most open to the revision of the Court; I mean the class of settlement cases; and that a question of the validity of marriage is in that Court a question of incident merely; and what has still more importance with me, high as the authority of such a decision must be, even with all these deductions, it is opposed by the uniform interpretation of the statute, given by the Court of Chancery since the passing of the act; a practical interpretation, which has been constantly, as I understand, acted upon by the interposition of its authority, in the appointment of guardians in such cases. Under this opposition of authorities, it will not, I hope, be deemed too much for me to remark, that this Court is rather left more to its own views of the subject, than if such a decision had stood without any opposition at all.

If then I am called upon to decide this case, I have already intimated, that attending to the general policy and morality of the law, to the principles of interpretation, and to the language of the legislature in this and other similar statutes, I am led to conclude, that the consent of the natural parent is not that consent which this act requires to be given, as essentially necessary to the valid marriages of illegitimate children. At the same time it is proper for the party to recollect, that a different opinion has been delivered upon this point.

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Horner v. Horner.

24th May 1799.

It is likewise proper that he should be apprised, that in the case of *Thoroton* v. *Thoroton*, in the Court of Arches *, and afterwards in the Delegates †, a separation for adultery was founded upon a marriage of this description. — And although that matter of the marriage passed *sub silentio*, no objections to its validity having been pointed out to observation, yet, as it was not, and could not be, dissembled in the libel, I cannot take upon myself to assert, that it did in no degree fall under the consideration of the Court in the decision of that case. It will be for the party to apply these suggestions to the security of his own future conduct, as he may be best advised. But my opinion, on the question brought before me, is, that the marriage is not conformable to the statute, and that it is my duty to pronounce that it is null and void. ‡

* 26th *January* 1797. † 21st *February* 1799.

‡ In the case of *Priestly* v. *Hughes*, *April* 20th 1809, on an issue directed by the Master of the Rolls to the Court of King's Bench, respecting the validity of a marriage of this description, that Court certified, in the following terms: — "This case has "been twice argued before us by counsel; we have considered "it, and are of opinion, that all marriages, whether of legitimate, "or illegitimate persons, are within the general provision of the "statute 26th *Geo*. 2d, chap. 33. which requires all marriages to "be by Banns or Licence; and that the consent of the natural "mother to the marriage by licence of an illegitimate minor is "not a sufficient consent, within the 11th section of that act: "consequently, that the marriage had and solemnized between "the said *John Wynne Hughes*, and *Jane* the mother, on the "9th *September* 1792, in manner aforesaid, was not a good and "lawful marriage, but was void by force of the said statute of the "22d *Geo*. 2d, chap. 33.

"Ellenborough.
"S. Le Blanc.
"J. Bailey."

Mr. Justice *Grose*, dissentient for reasons assigned by him. Vid. *East's* Rep. vol. 11.

OLIVER *v.* OLIVER.

25th *June* 1801.

Restitution of conjugal rights. Counter-allegation,—of *cruelty* in *menacing* and *insulting treatment*, and prayer for divorce thereon, not sustained on the facts. Restitution decreed.

THIS was a suit brought for restitution of conjugal rights by the husband, in which a plea of cruelty set up on the part of the wife, and a prayer for separation, were not established.

JUDGMENT.

Sir *William Scott.*—This is a suit brought by *Thomas Oliver* against *Frances Oliver*, his wife, for restitution of conjugal rights. The marriage is proved; the husband therefore is entitled to what he prays, unless some circumstance has deprived him of it. Mrs. *Oliver* has given in an allegation, in which she pleads that Mr. *Oliver* had been guilty of cruelty, and prays to be divorced from him. She has examined seventeen witnesses to that plea, and upon their evidence I am to determine the cause. If he has treated her in the manner pleaded, it will undoubtedly be a sufficient bar to the action, and she will be entitled to a sentence of separation; on the contrary, if there is not that sufficient proof which the law requires, it will be her duty to return to her husband, and endeavour to spend the remainder of her days in peace and mutual kindness.

The marriage took place in *June* 1798, when her former husband had been dead about a year. The *annus luctûs* was passed; but, during that interval, it appears she had entangled herself with some connection, tending to a matrimonial union with Mr. *Bond:* and it is stated in the evidence, that there had been an action brought by that gentleman,

OLIVER v. OLIVER.

25th June 1801.

man, for a breach of promise of marriage, which failed. It appears, however, that she expressed great agitation of mind about it, during its dependance; it therefore may be presumed to have been an action instituted not without some foundation. It appears, by the evidence of Dr. *Lake*, that this lady is not always very well founded in her complaints, and that she is rather apt to view things in erroneous and unfavourable lights. Mr. *Burchell* says, "that an action was brought by a "gentleman of the name of *Bond* against Mrs. "*Oliver* for a breach of promise of marriage; that, "though he has never heard Mrs. *Oliver* abuse or "insult her husband, he has heard her charge him, "with having involved her in that action, by his "precipitating her into this marriage; adding at the "same time, that if she had not been hurried into "it, she should never have suffered what she did."

This really appears very like a habit of shifting off very much from herself the consequences of her own act, on a person who is not at all answerable for it. The lady was arrived at those years of discretion, when she must be supposed to have been capable of judging of her own conduct, and her own interests. I can consider it only as her own act and deed, done with her eyes open, and with the perfect knowledge of all other engagements, which she might have entered into; I think therefore this was a complaint very improperly brought against her husband.

Dr. *Lake* says, "she was very apprehensive of "the consequences of the trial, and spoke with "considerable warmth and vehemence against Mr. "*Bond*, and against Mr. *Oliver*, in general terms "of reproach; and that she considered the object "of

"of each of them was to make a prey of her, and "to get what they could of her property." This sort of language strongly leads one to presume that the complaints, made by this lady, against other persons are not always founded in justice or truth. It appears that Mr. *Oliver* followed the business of a watchmaker, and likewise that of a dissenting preacher, — what his profits were, arising from these two occupations, I have no means of knowing; but it is reasonable to suppose they were of decent amount, such as two such employments might be expected to produce. Some imputations have been thrown out, that he was in a very inferior situation of life; it is clear, however, that he was not in circumstances of necessity, and that the union of two such persons, was not unsuited to produce mutual comfort, so far as property could secure it.

Upon the marriage, the lady, having very considerable property of her own, kept it in her own grasp, transferring to her husband only a very small proportion of it. Mr. *Oliver*, on becoming her husband, was at least her equal, if not her superior. It is the law of religion, and the law of this country, that the husband is entrusted with authority over his wife. He is to practise tenderness and affection, and obedience is her duty; and, in taking the character of wife, she is to take upon herself, at the same time, the duties attached to it.

It may, perhaps, be apprehended with some reason, that, where there is much disproportion of fortune, so placed originally, and so tenaciously retained, much harmony is not likely to be a lasting result. No situation is more calculated to produce the controversies that belong to *Meum*

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OLIVER v. OLIVER. 25th June 1801. and *Tuum.* Arrangements may be made sufficiently consistent with mutual affection and convenience; but none such appear to have been resorted to in the present case. Here the husband was scarcely on a proper footing: The carriage was always considered by the servants, as exclusively belonging to their mistress; they looked up to her alone; and the husband is placed in a situation of degradation, which must give both considerable uneasiness,—on her part to maintain, and on his part, to suffer it.

The charges, brought by the wife against the husband, consist partly of words of abuse and reproach, and partly of acts of a harsh and oppressive nature. Of words, it is sufficient to say, that, if they are words of mere present irritation, however reproachful, they will not enable this Court to pronounce a sentence of separation. She must try to disarm them by the weapons of civility and kindness; and if they fail (as unfortunately they often will), the law of this country requires, that she should submit to the misfortune, as one of the consequences of her own injudicious choice. Passionate words do not, according to the vulgar observation, break bones; and it is better that they should be borne with, than that domestic society should be broken up, and a husband and a wife thrown, in loose characters, upon the world. Words of menace, importing the actual danger of bodily harm, will justify the interposition of the Court, as the law ought not to wait till the mischief is actually done. But the most innocent and deserving woman will sue, in vain, for its interference for words of mere insult, however galling; and still less will that interference be given, if the wife

Oliver v. Oliver.

25th June 1801.

wife has taken upon herself to avenge her own wrongs of that kind, and to maintain a contest of retaliation. That the husband did, in various instances, insult his wife by words of abuse is, I think, sufficiently established in this case; and it will be his duty to reform such habits, if his wife should return to his society. The words used by him are certainly sufficiently rude; but the feelings of disappointment and dissatisfaction, in the breasts of persons of coarse education, naturally enough find their way from their mouths, in no very refined language, and sometimes with more violence of sound than meaning. And I am not convinced that I am to impute to this person, a real desire of making his wife miserable. He is said to have threatened "to horsewhip her." On another occasion, "that he would send her to Bedlam." Only one act of real violence is imputed, but in what manner proved? The witnesses are hardly worthy of the confidence of the Court. One of them is her niece; the incorrectness of whose deposition, I am willing to impute to mere want of recollection; but still I must consider it, on that account alone (if I restrict it to that) as unsatisfactory. Another witness is a child of fourteen years of age, who may have taken a wrong impression of what passed.

The third, is the cook, who, from her situation in the kitchen, could know little but what she received from report; and she is likewise subject to an observation that materially affects her credit. On her examination *in chief*, she confines her description of all the foul language that passed, to the mouth of the husband; but when pressed by the interrogatories, she admits that the wife's mouth was equally gifted; that there was much wrangling between the

OLIVER *v.* OLIVER.

25th *June* 1801.

the parties, and that the one was as much in fault as the other. Another witness, a servant, *Henry Dean*, seems throughout to have looked to his mistress as a *femme sole*, instead of looking up to *Oliver* as his master. In fact, the account of all the servants, in this family, seems to have been enlisted to their mistress, in a degree that calls for much jealousy, in the Court's estimation of their credit. This very person, a very young man, is proved to have declared, in direct terms, to another witness, that if he had such a wife, he would do to her what *Oliver* had only threatened to *do*.

A material witness, materially discredited, is I think, the party herself, on whose complaints the whole of the present application to the Court is founded. Here is a woman, at an advanced time of life, making a charge against her husband, that he was the author of her own precipitate marriage. When I see such absurd complaints brought forward, I feel that strong deductions are to be made from the testimony of the other witnesses, even if no contradictions of their own were opposed.—The testimony, in support of such a case, must be extravagant and high coloured. But the fact is, that there are contradictions of their own. *Margaret Thomas* admits "that she does not know whose "fault it was; that it appeared to be as much of one "as the other." *Dean* tells *Mary Owen*, one of the most credible witnesses of the whole set, that he would use correction and restraint, if he had such a wife. To look to witnesses of higher station, Dr. *Lake*, who visited the family, and who does not appear to have any bias upon his mind, that inclines him to either party, speaks of her as a person of asperity of temper, and as cheerful *when not provoked;*

provoked; "and he *thinks* he *must* say, that she has "not a *very* bad temper." Such is the doubtful and moderate panegyric which he has to give her. He says, that when he visited them after their marriage, he cannot say that Mr. *Oliver* treated her with disdain; but there was a good deal of wrangling and jarring between them. There was an unhappy want of accommodation, very much increased, undoubtedly, by the unequal circumstances in which the parties were placed, which could only be removed by tempers happily formed. There is, however, nothing in the evidence to charge Mr. *Oliver*, with being the sole cause of these quarrels; which, owing to the situation in which he was placed, unless with a very mild and amiable temper, could hardly have been avoided.

OLIVER *v.* OLIVER. 25th *June* 1801.

A second witness says, "that he visited them, "and this very shortly after their marriage: Mr. "*Oliver* began to treat his wife with the greatest "disdain and contempt, &c. &c." But when I find this witness, in answer to an interrogatory, speaking of a transaction happening in his own presence, I cannot think that all the inflammable matter was on the side of the husband. He says "that he "was in company with the parties about *January* "1799, when Mrs. *Oliver* flew into a passion, be-"cause Mr. *Oliver* smiled at deponent's calling "some elderly ladies, who lived at *Kensington*, "old tabbies; and she then proceeded to reproach "her husband with their inequality of situation, "and imputed to him the unworthy motive of "having married her for the sake of her money."— That she should be in a passion at his smiling at a thing, so perfectly inoffensive, as that was towards

Oliver v. Oliver. 25th June 1801.

wards herself, is behaviour of an extremely improper kind; and there cannot be a doubt but that the expressions made use of by Mr. *Oliver*, on that occasion, at least, were the consequences of that behaviour. — I will not apologise for this indecent language, nor defend the propriety of those expressions. I cannot, however, but advert to the manner in which they arose, in answer to an imputation cast on him of a very opprobrious nature: and with respect to the offence, against the delicacy of this lady, I cannot help thinking *that* is much lessened, when I see it in evidence, that she relates something that passed between herself, and husband, in the privacy of the marriage bed.

This is the general effect of the evidence, as applied to words of reproach: and I do not think there is that entire balance of ill conduct on the part of the husband, that would induce me to pronounce, that this lady has been causelessly insulted in the manner pleaded. The utmost, that I can allow is, that there are faults on both sides; and that the lady's temper has incurred some degree of blame, in using expressions which it would have been much better to have omitted; "that of "having married a beggar, and raised him to a "coach"—and such other language, as a husband cannot but feel great resentment on its being applied to him.

The next charge is, that of having used words of menace; from which the Court is to infer bodily injury; "that he would lock her up in a room, and "horsewhip her, and that he would send her to "Bedlam." I have already observed upon the credit due to *Dean*, who has spoken to this part of the plea; and I cannot but think that the story he

has

has delivered in his deposition is highly incredible in its own nature. He says, "he came into the room while the family were at *Brighton*, and he "observed his mistress in tears, and Mr. *Oliver* in "a violent passion with her, which he discovered "to have arisen from some dispute about poli- "tics, and that Mr. *Oliver* said, if she used that "language again, he would horsewhip her." How is that confirmed? Mrs. *Burchell* speaks of of no such behaviour; she thinks it arose out of the unhappy temper of Mrs. *Oliver*. Another witness gives a very candid opinion; she imputes the blame to both, and in the strongest terms denies, that she heard any language of this sort. The other words of menace are, that Mr. *Oliver* said sometimes—"that she was mad; that he told "the servants to take notice of her at the full of the "moon, and that they would observe a change in "her." Possibly this might be the impression on the mind of the man: If it was, am I to consider it as the language of mere invective and abuse? As to the threat of sending her to Bedlam, there are no witnesses who speak to the use of such words; but supposing them to have passed, and to be sufficiently proved, they do not prove malice; for they might be the expression of a real opinion, even though erroneously formed.

I come now to acts of violence; and I think there is only one described;—"that, in a coach "in *Piccadilly*, he held up a knobbed stick, and, "with the greatest fury, threatened to strike her;" but he did not actually strike her. It is a blind account of the matter that is given by the coachman, the only witness produced; the transaction passed after it was dark, and could therefore be

OLIVER *v.* OLIVER.

2?th *June* 1801.

very indistinctly seen by the coachman on the outside, sitting as those persons usually do. Of the commencement he knows nothing. The allegation states, "that she alarmed the coachman, and got "out of the coach, and went to Mr. *Pollock*'s house "for assistance." To him she gave an alarming account of what had happened to her in the coach, but it does not seem to have alarmed that gentleman very seriously; for his advice to her was to return into the coach, and go home, which, after some repugnance, she does, and home she goes. No person is produced, whom these cries of murder must have summoned to her assistance; for every body knows, that, in this great town, a prompt assistance would be given to a wife calling upon their humanity, for protection from a husband's attempt to murder. In short, there is nothing but her own account of the matter given in the allegation. Much of that account may be imputed to nervous agitation, arising upon a contest which began in the dark, and passed in the dark; and what its real character was, must remain in the dark; for seeing how little the allegation is in general supported by evidence, I cannot confidently presume, that the unsupported representation of this occurrence is perfectly correct.

The next fact charged is, that she, being kept in a constant state of irritation, and her illness, occasioned thereby, increasing upon her, she requested him to join with her and Dr. *Lake* in prayer, which he refused to do, and abused her for sending for Dr. *Lake;* but the whole that appears in the evidence is, that when Dr. *Lake* came into the room, and asked him to

pray

pray with her, he declined doing so; and this he might certainly do without any impropriety, for several reasons, that might possibly dispose him to decline such an office at such a moment.

The last act of violence, and one upon which considerable stress has been laid, is that in which she is described as having received much bodily hurt; and if satisfactory proof was given of *that*, the Court would, with great alacrity, interpose to protect her against its recurrence. But it must not be said, that a slight inattention or carelessness on the part of the husband, though it may accidentally, and contrary to his intention, produce mischief, will warrant the Court to pronounce a sentence of separation by reason of cruelty. Affection may exist, though accidents may happen in petty quarrels. What is the fact? One morning, when Mrs. *Oliver* was going out for the whole day, or a considerable part of it, there was a quarrel about the keys belonging to the wine and ale cellars, which Mr. *Oliver* required. Am I to be informed, that she had a right to refuse them? and that her husband was to be deprived of those accommodations if he required them? Where does she find the law for the refusal, if she does not shew any special agreement to such a strange effect? If not, surely this was conduct enough to exasperate a husband, to the extent at least of an endeavour to obtain possession of them. In the course of that endeavour, a struggle or scuffle takes place; and in that scuffle, the weakest goes to the wall, and she is unfortunately bruised in her arm and breast against the garden-steps. But is such an accident, produced by the vexatious and unjust refusal of the wife to deliver the keys, suffi-

 cient

OLIVER v. OLIVER.

25th June 1801.

cient to justify, in law, her refusal to cohabit with her husband. There is no reason to impute any malignant intention, or any other intention, than that of obtaining what he had a right to possess, and which was illegally withheld. A husband is not to be deprived of his marital rights, because a wife pertinaciously resists them; and, in the course of that resistance, encounters accidental injuries, which never were meant to be inflicted.

A good deal has been said with respect to a separation by articles of agreement: It does appear that, after this act of mutual violence, she applied to a respectable magistrate, and put herself under his protection. The advice, which he gave her, was perhaps more salutary than legal,—to proceed to such articles of agreement; the fact being, that the parties had pledged themselves, at the altar, to live together till death did them part. They pursued however a negociation, which finally became ineffectual, and they resort to this Court.

The only question remaining for my consideration is, whether such a case is proved on the part of the wife, as will entitle her to a separation from her husband. I am of opinion that it is not; and that she is under the legal obligation of returning to her husband, and that it is her duty to improve her mind by what has passed; and to recollect, that, having assumed the relation of a wife, she is bound to execute the duties that that relation imposes; and particularly to abstain, in future, from inordinate pretensions, and exaggerated complaints.

SOILLEUX *v.* SOILLEUX.

13th *July* 1802.

Divorce by reason of the adultery of the husband: Defence, that the charge amounted only to a *solicitation of chastity*, overruled.

THIS was a case of divorce instituted by the wife, in which the defence set up, that the facts only amounted to a *solicitation of chastity*, was overruled.

JUDGMENT.

Sir *William Scott.*—This is a suit brought by Mrs. *Soilleux* against her husband for cruelty and adultery. The parties were married on the 5th *January* 1786, and they cohabited together until that separation took place, upon which the present application is founded.

It appears, that this lady kept a boarding-school, for young ladies, at *Kensington*, and, by a very honourable industry, supported herself and six children. There are different accounts as to the contribution of the husband towards the support of his family; but it is clear, that his contribution formed a very small proportion, and that his industry was frequently of a very mischievous tendency. The general propriety of his conduct has been entirely given up;—his counsel have admitted him to be deserving of every reprehension, and have found it necessary to stand upon a strict specific principle of law.

The libel charges both cruelty, and adultery, though the former is not insisted upon. The witnesses are all of them acquainted with both the parties. One of them, living in the house, has proved, that Mr. *Soilleux*'s usual conduct towards his

Soilleux v. Soilleux.

13th *July* 1802.

his wife was extremely rude and oppressive: That he grossly abused her in the presence of this deponent, and of two scholars, and otherwise treated her with great harshness; and, at that time, took possession of her keys. In short, he endeavoured to make her life truly uncomfortable. The principal question however is, whether his conduct, as founded on the imputation of adultery, is so proved, that the Court can found any sentence upon it.

I need not remark, that, in a house like the one in question, where there are five daughters, and a great number of female scholars, the purest manners ought to be observed by every person in it; particularly by him, whose example was likely to have so much influence, from the situation he held in it. I am compelled to say, that his general conduct was as inconsistent with this obligation, as possible.

It is proved, by several of the witnesses, that he, as it has been termed, *solicited their chastity. Solicitation of their chastity* is a very gentle description of the facts; for here are acts of bodily violence, which go far beyond the bounds of mere solicitation, particularly in the case of *Theresa Tiellier*, who was assaulted by him in the earlier part of the history, in the year 1797; and nothing but a very obstinate resistance, on her part, could then have prevented her ruin. It appears, that this witness was absolutely under the necessity of quitting the family, on account of the immodest, and brutal behaviour, and attempts of this unprincipled man; and, I think, she acted with all necessary prudence on the occasion. There is nothing of malice or resentment, by which her deposition can be considered to be at all discoloured; on the

 contrary,

Soilleux *v.* Soilleux.

13th *July* 1802.

contrary, she positively consults with a lady, who was a parlour boarder in the house, and who advised her not to make any representation to her mistress. She at length retires in silence, in consequence of this molestation. There is another witness who speaks to the same effect.

These witnesses are stated to be merely evidence to character; but, I think, their evidence is stronger, because they prove that Mr. *Soilleux* was perfectly disposed to commit the crime with which he is charged, and that he took the most active and violent measures, for effecting his purpose, and that nothing but the consent of the other party was wanting. Such consent appears, in one instance, to have been given. It is this that makes the conduct of *Mary Wiltshire*, the person charged, extremely material, and the evidence which she supplies stringent in the extreme; because, when the criminal disposition of the man has been most satisfactorily proved, and when it is also proved, that the conduct of this female was so different on former occasions, when she had withstood his attacks, — if, after such a situation as is described in the evidence, she ceases to complain, her silence and submission furnish the strongest presumption, that his attempt here had been more successful. *Mary Cromwell* speaks "to going up stairs, "and finding Mr. *Soilleux* and *Mary Wiltshire* in "her mistress's bed-room together." I shall not, however, enter into a description of the situation of the parties; but the state and condition were such, as authorize the Court to draw the inference, that the act of adultery had been committed.

It is said, there is an inconsistency, between the account, given by this witness at the time, and

 that

Soilleux v. Soilleux

13th July 1802.

that which is now stated in her deposition. It does not appear to me that any such inconsistency exists. The different statements are such as any man's understanding may reconcile. How then stands the fact? The witness, on the discovery to which I have just adverted, goes away under the impression in her own mind that an act of adultery had passed. It is said, that it is only an inference, — but unless there is reason to presume that the inference is incorrectly drawn, it is almost conclusive. She immediately communicates the circumstance to *Crouse*, the other witness. Mr. *Soilleux* presently afterwards comes into the kitchen, nearly in the dress in which the witness had just seen him. He calls her away, and bids *Mary Crouse* stay in the kitchen, which a man, conscious of what was going forward, would naturally do. What is the character of the other party? I admit, that the declaration of a *particeps criminis* would be but weak evidence in a common case; but in such a case as the present, where the criminal intention was so fully established, and nothing but the consent of the other party was wanting, — I say, the conduct of such a person is evidence of the most stringent kind, that the act, which he was always attempting to accomplish, had actually taken place.

Now, what is there in the behaviour of this person, to induce a belief that she had, in the act in question, given any opposition, and that he had been equally unsuccessful, in this as on other occasions. Before this period her master had persecuted her with the same odious addresses, and she had complained of them; but, after this discovery, she makes no complaint, nor expresses any uneasiness what-

whatever. Is that the conduct of a person who is averse to the gross importunities of such a man? What is the conduct of the other witnesses? — Of a very different nature, — that of resistance at the time. It is said, if any persons had gone into the room, when any of the other attempts were made, they would have found exactly the same appearance, and nothing more; and that the crime was not more likely to have been committed, in this particular instance, than it would have appeared in the other. But would they not, in such case, have heard the complaints of the party? Would she not have cried out? Would she have submitted afterwards? If she had been under similar circumstances, would it not have been known? But, in this instance, there was no representation to the other witnesses, of the manner in which she had been treated. If the fact had been perpetrated, and without her consent, would she not have remonstrated against her master? That is the natural and necessary conduct of an innocent woman in such a situation; but when all complaints had subsided, what am I to presume, but that the resistance had been totally subdued.

Under these circumstances, I am satisfied that this is no case of *solicitation of chastity*, but that it is an act of adultery, as sufficiently proved as the law of evidence, in this Court, requires. Here is a person continually exerting his wicked industry in order to accomplish his purpose, who did not succeed in every instance, because there was a firm opposition; but, I think, it is impossible for any man, reading this evidence, and looking at the different parties examined, to entertain any doubt, either in his private or his legal conscience, that in this

SOILLEUX *v.* SOILLEUX.

13th *July* 1802.

this particular instance he had triumphed over the weak resistance of this woman, and had actually committed the fact.

Here has been no defensive plea: The interrogatories, however, administered on the part of Mr. *Soilleux*, insinuate calumnies of the grossest and most unfounded nature against his wife, and against another person equally innocent of the charge. I cannot but consider this as a great aggravation of his misconduct. It appeared that he had charged his wife with improper behaviour with Mr. *Tomkins*; but afterwards, by his letters to Mrs. *Soilleux*, he attributes it to the effect of jealousy, and speaks of her in terms of the greatest esteem and approbation. If he felt himself bound in justice to retract in this matter, why were these interrogatories administered, tending to throw aspersions upon the conduct of innocent persons? This is a continuation of the atrocious conduct, which has marked the character of this man throughout. The Court, under these circumstances, cannot entertain the least doubt, that the wife is entitled to the remedy which she prays; and It therefore pronounces for the divorce.

With respect to the costs — the only ground on which it is possible to say that Mrs. *Soilleux* would not be entitled to her whole costs, is, that she pleaded matter which she has not proved. — If it could be shewn that she had done so wantonly, it would affect a part of the costs, though there is no reason to saythat it would affect the whole. But I am far from thinking that there was no reason for such inquiry, although it may not have been in her power to find the necessary proof; I think therefore no *mala fides* has been shewn.

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As to her having an independent income, and he being destitute, that is no reason why she, having applied for redress to the Court, and having established her case, should not be entitled to her costs. The insufficiency of the fortune of Mr. *Soilleux* must be left to his own consideration, as it is his own misconduct that has made him liable to this judgment. — I shall therefore condemn him in *costs*.

SOILLEUX *v.* SOILLEUX.

13th *July* 1802.

STEPHENSON *v.* LANGSTON.

THIS was a suit to compel *John Langston*, Esquire, to serve the office of Churchwarden in the parish of *Saint Edmund the King*, *London*. — The question came before the Court, on act on petition, which stated, on behalf of Mr. *Langston*, "That he was a partner in a banking-house, to "which he resorts only for the purposes of business; "that he neither sleeps nor eats there; but that he "lives at *Sarsden House*, *Sarsden*, *Oxon*, and in *Clif-"ford Street*, in the parish of *Saint James*, *Westmin-"ster*, in both of which he is liable to serve parochial "offices; that he is a justice of the peace, and "deputy lieutenant for the county of *Oxford*; that "there was a partner residing in the banking-house, "and that the house stood in two parishes."

10th *Feb.* 1804.

Parochial office. Non-resident partner, in a house of trade, not exempted from serving the office of *Church-warden*.

On the part of the Parish it was replied, "that "great inconvenience would ensue, if such persons "were not compellable to take the office, when duly "elected, as several mercantile houses are made by "throwing two or three houses into one; and *that* "would

STEPHENSON v. LANGSTON.

10th *Feb.* 1804.

"would make the offices come round more frequently; that the house is rated to the *Firm*, and "that Mr. *Langston*, in virtue of the house, would "have a right to vote in vestry, and exercise any "parish privilege." *

JUDGMENT.

Sir *William Scott.*—As this case is brought before me in order to establish a general rule, I will state the result of my researches, as far, at least, as the authority of the adjudged case † in the Court of Peculiars extends. That case is nearly the same as the one before me: and it was there determined, that a partner in a house of trade, though not living in the house, is obliged to serve the office of Churchwarden. In that case the act stated, "that the suit was unduly brought by *Brook*; "that *Owen* lived in *Saint Swithin's Lane*, in the "parish of *Saint Swithin*, and at *Lestley*, in the parish "of *Hackney*, and had never been an inhabitant "of the parish of *Saint Michael Royal.*"

On the part of *Brook*, it was alleged, "that not-"withstanding he, *Owen*, never lived in the parish "of *Saint Michael Royal*, he was a partner in the

21st *Feb.*

* After the argument on the act on petition, an affidavit was exhibited on behalf of Mr. *Langston*, stating that he had been appointed High Sheriff of *Oxfordshire*. The King's Advocate observed, that Mr. *Langston* had been invested with this office only since the beginning of *February*, which was long after the institution of this suit; he therefore prayed the Court to pronounce him liable to serve the office of Churchwarden. The Court said, that this was a mere civil proceeding, calling upon Mr. *Langston* to serve a parochial office, and that It therefore could not but think, that his being invested with the custody of a County by the King's writ, would exonerate him.—Party dismissed.

† *Brook* v. *Owen*, 1717.

Stephenson v. Langston. 10th Feb. 1804.

"house of *Edmonds*, a sugar baker, and held "a lease of a warehouse and workhouse for the "purposes of his trade; that, upon the choice of "a Lecturer, he lately had voted separately from "his partner, and lastly, that, in *London*, it was "customary for persons to serve the office of "Churchwarden in the parish in which their "house of trade stands." To which *Owen* replied, "that he did hold part of a lease of some "premises; but that, by a separate instrument, "the dwelling house was assigned to the use "of the other partner; that, with respect to "voting, he was in the church; and, standing "amongst other persons, was accidentally reckoned, "though his vote could not have been admitted, "if there had been a scrutiny demanded."

The cause came on for hearing upon the act; and it must have been considered on the principal circumstance stated in it, and not on the presence of *Owen* in the church, and voting at the choice of a lecturer; for an erroneous claim cannot make eligible a person, who had no right to vote. The judgment, therefore, could not have turned upon that ground alone. Here then is the decision of the Judge of the Arches, as well as of the Peculiars; for Dr. *Andrews* held both offices. That judgment, therefore, is binding on this Court; and if it is thought not founded on law, must be set right by the superior court*. If Mr. *Langston* had not been exonerated

* This sentence was accordingly brought before the Court of Arches,—on appeal,—when Sir *William Wynne*, in the course of his Judgment, referred to other authorities to the same effect; observing on the form in which the appeal was brought, as being only from the decree of costs, and for the purpose of establishing the *principle* of *law*, said,—I have no objection to state my opinion upon it, though I do not think it would have the binding effect 19th *June* 1805.

STEPHENSON v. LANGSTON.

10th *Feb.* 1804.

exonerated by his appointment as Sheriff of *Oxfordshire*, I should have decreed that he was bound to serve the office assigned to him by the parish. The suit has been properly brought, and the Churchwardens are entitled to their expences. I understand, from those who are well acquainted with the customs of the city of *London*, that persons are

effect of complete authority, from the way in which this appeal has been conducted.

Here is a banker, at the head of a company of bankers, in a parish in the city of *London*—occupying a house in which the business is carried on; and where Mr. *Langston* regularly attends: But he says, "that he has a house in the country, and one also, in "another part of the town, where he takes his meals and sleeps." He is at this house however in the city for business, and pays parochial taxes. Can it then be said, that he shall not be liable to serve burdensome parochial offices? It would be hard indeed on the other parishioners, if he were exempted merely because, for his own convenience or amusement, he has a house elsewhere.—What has been alleged in objection to this? "That the office of "Churchwarden is an office which requires personal attendance; "that the Churchwarden manages the concerns of the parish, is "overseer, &c." I do not however see why he cannot manage the temporal concerns of this office, as well as his own business, or why he cannot conveniently attend service in the Church on *Sundays*. There are many persons who attend business six days in the week, and go into the country for the *Sunday*; and if they should be chosen Churchwardens, and think that the duty of their oath calls upon them to attend the service of the Church, in the parish where they have been elected, they can attend as conveniently on that day, as they do on the others for their own affairs.

In addition to the case, which has been cited, I will mention also the case of *Ford* v. *Chauncy* (*a*), which was a well argued case, in which it appeared that the party exercised the trade of linen draper—the father occupied the house and kept it—the son lived as boarder with the father, and was a partner,—the rent was paid out of the profits of the business: The son was chosen Churchwarden, and the Court held, that though he would not have been liable as an inmate, he was as a partner.

(*a*) 1715. Archdeaconry of *London*.

I.

I.

are eligible to civil offices, who are not personally resident in the parish, but are partners of a house of trade situate within it. On the authority to which I have referred, this must be understood to be the rule in future; and if it is proper to be reversed, must, as I have before observed, be reversed elsewhere by a superior court.

In *Bolton* and *Gill* v. *Zachary* and *Stevens* (*a*), *Zachary* and *Stevens* were elected Churchwardens.—*Zachary* pleaded "that he "was an inhabitant of another parish in *London*." — *Stevens* set forth, "that he was of the parish of *Camberwell*, and therefore that "neither of them were of the parish, for which they had been "chosen; that, in their house of trade, as silkmen, a servant "only slept." They were both however held liable. In a note of that decision by Dr. *Paul*, it is said to be a similar judgment to one given in *Cook* v. Sir *John Ferrars*, in 1733; but of which there is no further mention: They seem to be concurrent cases.

In the case of *Gilchrist* v. *Bracebridge* (*b*), the party was serving a parochial office in another parish in *London*. This was a very strong circumstance, as much perhaps as if he was Churchwarden there; and no Court would say, that the same person should serve the same office in two places at once.

These then are the cases which occur to me as bearing upon the present question. In the course of the argument upon the case now before the Court, the statute respecting constables (*c*) was alluded to, and some analogy has been attempted to be drawn from that office, to shew that personal duties cannot be imposed, when there is not personal residence; and that a new constable is chosen, when the one, who has been appointed, goes out of the parish So far indeed the analogy is correct, that if a Churchwarden quits the parish where he is serving, his place must be supplied. But this is not such a case. On the consideration of all the authorities, which seem one way, I should be of the same opinion with the Judge of the Consistory, if the cause had come before me, on the question of eligibility; but it has not been so brought. I therefore affirm that part of the sentence "condemn-"ing Mr. *Langston* in costs."

(*a*) 1748. (*b*) Commissary of *London*, 17[illegible]6.
(*c*) 13 & 14 Ch. 2. c. 12. s. 15.

THE OFFICE OF THE JUDGE PROMOTED BY BURGESS *v.* BURGESS.

21st *Feb.* 1804.

Incest — Office of the Judge against parties living in incestuous cohabitation. *Separation. Penance.*

THIS was a suit of Office, promoted by *John Burgess*, the nephew, against *William Burgess*, for incest, by reason of cohabitation with his niece, *Ann Lyde.* — The articles set forth their genealogy, and that they had lived and cohabited together, as man and wife, for several years.

JUDGMENT.

Sir *William Scott.* — This is a cause of Office promoted by *John Burgess* against *William Burgess*, for an incestuous cohabitation with *Ann Lyde*, his niece. — The first point to be established is the cohabitation of the parties. It is not denied that they live together in the same house, and that she has assumed and bears his name, while her own original name is not concealed; but whether they live together upon the footing of uncle and niece, or husband and wife, is the principal question to be decided; and the nature of their cohabitation is, I think, sufficiently explained by the evidence of one of the witnesses. *Mary Etches* says, "that, "on the 24th *Dec.* 1800, she went to live, as servant, with Mr. and Mrs. *Burgess*, who, at such "time, resided at No. 27, *Great Portland Street*, "*Oxford Road.*" — It is proved, by several witnesses, that these parties went there to reside in 1795, and that they have continued there from that time to the present; there cannot, therefore, be any doubt of the identity of these persons. — The same

same witness goes on to say, "that she continued "in their service one week; that, in the apart-"ments, occupied by Mr. and Mrs. *Burgess*, there "were only two beds, the one which the deponent "slept in, and the other for her master and mistress; "and that they lived and cohabited together, as "lawful husband and wife, and owned and ac-"knowledged each other as such; and that the "deponent, whilst in their service, never saw them "actually in bed together, but she has at two or "three times, whilst warming the bed, seen the said "Mr. and Mrs. *Burgess* undressing by the side of "it; and, in the morning, there were evident "signs of two persons having slept in the said "bed: she therefore does verily, and in her con-"science, believe, that they, during that week, "occupied one and the same bed."

There are other witnesses, who speak to circumstances which strongly support this account of the cohabitation. *Sarah Fletcher* says, "that, about "four or five years ago, she heard *William Burgess* "declare he was married to her sister *Ann Lyde*; "and that she was present when *Ann Lyde* was, by "a visiting acquaintance, called Mrs. *Burgess*." It is true, that this witness says, "she does not be-"lieve that the parties cohabited together;" but she is evidently desirous of putting a favourable construction upon it. There is another witness, *Ann Lewis*, who says, "that one morning, about "two years ago, *William Burgess* called at the "deponent's house for some taxes for the parish, "when the deponent inquired of him how Mrs. "*Lyde* did? He replied, she was no longer Mrs. "*Lyde*, but Mrs. *Burgess*." Mr. *George Burgess*, and Mr. *Hugh Burgess* the younger, both speak to

BURGESS *v.* BURGESS.

21st *Feb.* 1804.

conversations which strongly mark the same intercourse. Mr. *Hugh Burgess*, a gentleman in an advanced stage of life, to whose testimony I give great credit, says, " that having reason to believe " there was an incestuous connection between his " brother and his niece, he discontinued his ac- " quaintance with them, and did not visit his bro- " ther for some years; but hearing he was danger- " ously ill, and wishing to fulfil the office of a " brother, he went to see him." Mr. *George Burgess* says, " he went, by the desire of the Promoter " in this cause, to *William Burgess* at his residence " in *Great Portland Street*, for the purpose of " talking with him, on the impropriety of his con- " duct, and that he expostulated with him upon the " indecency in which his sister and he were living." Of the nature of this cohabitation, I think, that, on this evidence, no doubt can be entertained.

The prosecution is commenced for a two-fold purpose, one civil, as to the interests of the party promoting, the other penal, to compel the abatement of a nuisance extremely offensive to the laws and manners of society. It is of great importance, that such an improper intercourse should not be allowed to grow out of the relations of persons closely connected by blood: It would tend to endless confusion, and the sanctity of private life would be polluted, and the proper freedom of intercourse in families would be destroyed, if such practices were not discountenanced in the strongest manner. Something has been said upon the motives which may have led to this prosecution; it is not, however, very material to inquire into them, since a man may bring a proper suit on motives that might not be commended, and the Public have an

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interest in such prosecution: I see nothing, however, in the general nature, or in the particular circumstances of this case, which justly attributes any imputation to the party who promotes this suit.— That his uncle should live in this manner, might operate as a stigma upon the family generally; and what the promoter has avowed honestly is, that it may affect himself in procuring a maintenance by the practice of his profession. In the terms, also, which have been proposed for putting an end to this suit, I see nothing but a fair solicitude to have the nuisance removed: there is no attempt at an extortion of money; and the declaration of one of the witnesses, that he offered to drop the suit for a money consideration, would not avail, even if it were brought home to him, which I think it is not, by any credible evidence. The family feelings, which would naturally dwell in the mind of Mr. *Hugh Burgess* the elder, are sufficient to call the attention of the Court to such intercourse subsisting between the parties. Laying, however, these considerations aside, I shall proceed to inquire farther into the particular features of this case.

The nature of the cohabitation is proved; and the great fact of the case then is, whether *William Burgess*, the party proceeded against, is or is not the legitimate son of *William* and *Joan Burgess*, from whom *Ann Lyde* is undoubtedly descended. No register of baptism is produced; and it is said, that this being a criminal charge, it cannot be proved by circumstantial evidence, and that this want of a register is a fatal defect. If that be true, that it cannot be proved by circumstantial evidence, it is perfectly unlike all other criminal cases. The highest crimes are so substantiated. The register,

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Burgess v. Burgess.

21st *Feb.* 1804.

even if it was produced, is only circumstantial evidence; for it contains nothing but the recorded acknowledgment of the parents. When cases are called for, it should be remembered, that they are not necessary to prove the general principles of law, but the exceptions to them. I am therefore of opinion, that the absence of proof, by the register, is not a fatal defect.

There is a great body of evidence, both of the positive and negative kind, to shew that he was the son of *William* and *Joan Burgess*: a number of witnesses have been examined on the allegation, given in by the promoter; and certainly it is no small recommendation to the evidence, that it chiefly comes out of his own family; and that some of the witnesses have known him from his earliest infancy. To be sure, it is impossible to have stronger affirmative evidence, or to entertain a moment's doubt, that this man was the son of the persons, who are described as his parents. The evidence is all in one constant tenor — his education in early life — the acknowledgments of parents,—brothers and sisters — at all periods of his life, are spoken to; and there is not an occurrence which bears a different aspect: he describes himself as their son, he is treated as their son, and there is nothing of surmise, proceeding either from himself or them, that he was otherwise considered. Mr. *Hugh Burgess*, who is his younger brother, and who was domesticated with him at an early period, and who, if there had been any doubt in the family, must have known it, speaks to the full acknowledgment of his parents: as do all the other members of the family. He shews no animosity towards his brother, and must, therefore, be considered as a strong witness of this fact.

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The case, however, does not rest entirely upon this positive evidence: There are some circumstances of a nature merely negative, which would weigh considerably with me, if they were wanted. An allegation has been given in by the party, for the purpose of establishing that he is not the son of *William* and *Joan Burgess*. If he is not the son of those persons, in whose family he resided from the earliest period, and under whose care and management he is brought up, the first thing which the Court expects is, that it should be distinctly alleged whose son he really is. But there is no such averment. It only ventures to allege, "that, on several occasions, *William* and "*Joan Burgess* declared him to be the illegitimate "son of *some* other person, and that he was so "reputed." It does not aver that he *was* so. It then pleads, "that there was a person in the "neighbourhood of the name of *Trott*." It does not say he was his issue, but of some person of that family, although that person never appears to have existed. Nor do I see any allusion made to the supposed mother of the party; and if he was illegitimate, his mother is as capable of being pointed out as the father. Every body knows, that, in an obscure parish, if an illegitimate child comes into the world, it is always pointed out, and is a thing eagerly caught up and proclaimed, to what mother that child belongs. There is, however, no suggestion of that kind; — here neither father or mother are assigned to this person; who, all at once, is found in the family of *William* and *Joan Burgess*, without any reference to his birth.

Several witnesses have been examined, upon interrogatories, as to his going by the name of

 Trott,

Trott, but none of his family are among them. The Examiner, who has taken this evidence very carefully, had the same general interrogatories to put to Mr. *Hugh Burgess*; but he appears to have been directed to withhold these particular ones from him, who, indeed, was the most likely person to have given an account of this material circumstance. This alone is enough to satisfy the Court, that the party distrusts the honesty of his own plea. Up to the age of seventy-five, this person has always conducted himself as the son of *William* and *Joan Burgess*; if it was otherwise, on the remonstrance made to him by the brother of the promoter of this suit, would he not have replied, "I stand in no such relation, in point of consanguinity, for I was introduced into the family, and "you know my name is *Trott*." But there is no suggestion, on his part, that he was not a member of the family,—he merely says "he had "treated her as his wife, and would continue to "do it." Would he not rather have taken that opportunity to justify himself from the accusation? On this affirmative, as well as negative evidence, it is impossible not to construct a perfect conviction, or to raise any doubt, that this man is the son of the parents alleged, and that he is the uncle of *Ann Lyde*.

The counter-allegation assigns him no parent; but there are three grounds on which it rests the case: first, that there is no register of his baptism. This, though it, certainly, is not a fatal objection to the proof of legitimacy, is an objection, and requires to be helped out by some kind of subsidiary evidence. The Court, however, will consider, that, in former times, registers were, in different

different parts of the kingdom, kept with different degrees of accuracy; and that this is particularly alleged to have been carelessly kept; there being an instance of inaccuracy as to this very family, in the omission of another child, *Jane*, whose legitimacy is not doubted.

The second objection is, that, in the early part of his life, he went by the name of *Little Trott*, while he lived with his father and mother; that he afterwards went to live with his uncle, *Rodd*, to learn farming, but being dissatisfied, he returned to his father's house, when he was about the age of fifteen. At this period of his life, there does appear to be evidence that he was familiarly called, among his play-fellows, by the name of *Trott*, a name that generally appears in conjunction with the epithet of *Little*. The witnesses, however, do not venture to draw the inference, that he was the son of a person of that name. Nick-names are easily acquired among boys, and it is admitted, that he was not held to be the reputed son of any Mr. *Trott*. One witness, an old woman, says, "she heard the mother once call "him a bastard;" and it appears he had, at that time, been under the chastisement of his father; and that *Joan Burgess* was heard to declare, "that unless he was taken out of the way, she "was sure *William Burgess* would do that bastard "an injury." This witness, it must be observed, is above seventy years of age, and is bold enough to speak to what happened when she was only six years old, which is deposing in a manner that cannot much be depended upon. The word bastard is often used, in the language of common people, not very discriminately, and is applied without

 meaning

BURGESS *v.* BURGESS.

21st *Feb.* 1804.

meaning that a child is illegitimate, and it is clear, that this party had no connexion with any person of the name of *Trott.* It must also be considered, I think, that the name was only one, which he had acquired among the children of the parish.

The third ground is, that he was treated differently from the other children. This is also supported only by several old women, who differ very much from each other in their representations. Some say the father was a very religious and moral man; others, that he treated this child with great severity. This evidence is much weakened by the want of consistency; and what weighs most strongly is, that Mr. *Hugh Burgess,* the brother, positively denies this assertion of partiality; and deposes, that he was treated as the rest of the children in the family. One distinction does appear,—that he had not the same benefit of schooling with the other children, and that is, in some degree, accounted for, as he had been absent with his uncle, during the greatest part of the period, in which the other branches of the family received their education. What does all this come to? that he had been treated with some harshness by his father, whom he had obstructed in his views of settling him in life. Upon the whole view of the case, I find it impossible to entertain a doubt; the proof of legitimacy stands clear of any objections to which the Court can attend. A surmise to the contrary was never set up till this suit was brought: It was an after-thought of the party.

The consanguinity, then, being established by full evidence, the sole question that remains is, what is to be the result of these facts, and of the

criminal

criminal cohabitation, proved between this person and his niece? In considering that, I must look a little to the situation of the man, who is of a very advanced age. The principal effect of this prosecution is not so much penal as remedial; and the usual punishment for such an offence, is that of public penance. In the older canons*, which, perhaps, can hardly be considered as carrying with them all their *first authority*, a *solennis pœnitentia* is enjoined before the Bishop of the Diocese. This, however, as I have just remarked, is now softened down. Attending then to what, I think, is the most material point, the removing of such a scandal; and looking to the age and infirmity of the party, and what might be the consequence of such a punishment: — the Court will not think it necessary to inflict the public penance; but condemns him in the *full* costs of this prosecution; accompanying this with the injunction, that the same intercourse must not continue, but must be *bona fide* and substantially removed.

BURGESS *v.* BURGESS.

21st *Feb.* 1804.

To persons, who have lived as these persons have done, it will not be sufficient for them to have separate beds in the same house; but they must live, in future, separate and apart; and if obedience be not given to this order, excommunication and other consequences will necessarily follow. †

* Archbp. *Peckham*, A. D. 1288. Vid. Gibs. Cod. p. 1043.

† In this case, it did not appear that there had been a marriage celebrated between the parties, and no such fact was pleaded in the articles. — In the case of *Blackmore* and *Thorp* v. *Brider*, Arches, 29th *April* 1816, on articles for incestuous cohabitation between a father-in-law, and the daughter of his first wife, a marriage was pleaded; and the articles prayed the Judge to pronounce such marriage null and void. The sentence passed in that form, enjoining also separation and penance.

WAKEFIELD *v.* MACKAY, FALSELY CALLING HERSELF WAKEFIELD.

17th Nov. 1807.

Suit of nullity of marriage, by reason of publication of banns in a false name, not sustained by the facts.

THIS was a case of nullity of marriage, brought by the husband, on the ground that the banns were not published in the true name, as required by the 26 *G.* 2. *c.* 33.

JUDGMENT.

Sir *William Scott.*—This is a suit, for the nullity of a marriage, instituted by *Daniel Wakefield*, Esquire, against *Isabella*, described in the libel as *Isabella Mackay*, falsely calling herself *Wakefield.*

The parties were married in the Church of *St. James, Clerkenwell,* on the 29th of *May* 1805, after a proclamation of banns in the name of *Isabella Jackson.* — It was observed, that this was not a new connection, and it certainly was not, either with relation to the time of their acquaintance, which preceded this marriage, or to the nature and description of their intimacy.

Mr. *Baster*, who was examined, and who appears to be a fellow student of Mr. *Wakefield*, at one of the Inns of Court, deposes, upon the fifth interrogatory, " that he had understood from the said " *Daniel Wakefield*, the producent, that he, the " producent, first became acquainted with the " ministrant six or seven years ago." This brings it to about the year 1800. — It appears, that she and Mr. *Wakefield* cohabited together during the former and latter part of that period, and that she lived with him under the name of *Isabella Lascelles.* Who is the seducer, and who is the seduced in this

case,

case, does not at all appear by this evidence, neither is the age of Mr. *Wakefield* disclosed; but the woman appears to have been of extreme youth at this time — by the dates assigned, not more than fifteen years of age, which lays some ground of probability, that she did not take the active lead in forming this connection. What name she bore at the time Mr. *Wakefield* was introduced to her, or under what circumstances she was living, does not at all appear. In 1802 she took the name of *Lascelles*, Mr. *Wakefield*, at the same time, assuming the same name, and passing as Mr. *Lascelles*, the husband of Mrs. *Lascelles*: he introduced her, as his wife, to a boarding school, where he visited her, he passing under that name. In 1803 she took the name of *Thorpe* — the manner in which that was done, is thus described in her answers, "that, upon going to *Salisbury* and other places "in the character of an actress, Mr. *Wakefield* "tendered to her a list of names for her acceptance, "recommending the name of *Baddeley*; that she "disapproved of that name, and chose, in pre-"ference, the name of *Thorpe*. In 1804 she re-"turned to *London* — they then cohabited to-"gether; he under the name of Mr. *Thorpe*, and "she under the name of Mrs. *Thorpe*; he taking "a house, and keeping a house, paying bills, and "carrying on other transactions in that name."

In the month of *September* in that year, a Roman Catholic marriage was celebrated between them, and she assumed his proper name of *Wakefield* with his full approbation and consent. After this ceremony, solemnly though not validly performed, she attracted the affections of this witness, Mr. *Baster*. He admits, upon an interrogatory, "that "after

WAKEFIELD *v.* WAKEFIELD.

17th *Nov.* 1807.

"after the said marriage, according to the rites of "the Roman Catholic Church, he himself made "professions of love and affection to the mini- "strant, and endeavoured to prevail upon her to "leave Mr. *Wakefield*, and marry him, the Re- "spondent; and, in or about the month of *April* "1805, he caused banns to be published, in the "Parish Church of *Iver*, for the marriage of him- "self with the said *Isabella Wakefield*, by the "name of *Isabella Jackson*."

That this offer, on the part of Mr. *Baster*, was produced by any effort of her own, is, I think, repelled by the account which Mr. *Baster* gives,— "that he was the person who endeavoured to "prevail upon her." He describes her as a woman of an engaging person and interesting manners. The only unfair practice imputed to her is, that she fraudulently concealed the circumstance of her birth and parentage, and pretended a connection with divers noble and illustrious families. To that fact Mr. *Baster* is the only witness, and he proves, "that she did state herself "to be the daughter of the Honourable Mrs. "*Sandford*, and that she was connected with the "Marquis of *Thomond*, and other considerable "persons." That this was done for the purpose of effecting any marriage, or the particular marriage upon which I have now to decide, does not appear. It might be the gratification of an idle vanity, the purchase of a little present importance, among the persons with whom she was living; and not at all with any view to the effectuating of any marriage; for, upon the whole of the evidence, I see no anxiety on her part to procure the marriage: she had been content to live upon lower

terms

terms with Mr. *Wakefield*. Mr. *Baster*'s admission, upon the eighth interrogatory, proves, I think, that her ambition was not very active in procuring this marriage; for he answers, " that " he believes Mr. *Wakefield* frequently entreated, " and endeavoured to prevail upon the ministrant " to consent to be married to him, and that it was " in consequence of such entreaties they were " afterwards married to each other;" and when she is married, she does not use the name of *Sandford*, whose daughter she had represented herself to be, but the name of *Jackson*.

I see no reason, therefore, to think that this fraud was practised with the intention imputed in the libel — " that she falsely pretended that her " real name was *Jackson*, and that she was related " to divers noble and illustrious families, and to a " person who had married an opulent *West India* " planter, of the name of *Wells*, stated to be her " aunt; and that she, having completely gained " the affections, prevailed upon the said *Daniel* " *Wakefield* to consent to be married to her, and " she accordingly was so married." The representation being, that, on the contrary, it was he who endeavoured to prevail upon her, and that she consented to this marriage in consequence of his solicitation.

I see no reason to think that this fraud had that effect upon Mr. *Wakefield*; because, from his answers, I collect it to have been his general persuasion, that she was the daughter of this person, —the same as she is described to have been in the libel. But taking the fact to be otherwise, that a fraud had been practised with this view, and that it had been successful, — that Mr. *Wakefield* had

been

WAKEFIELD *v.* WAKEFIELD.

17th *Nov.* 1807.

been captivated by this pedigree, which she had assumed to herself,—still that will not, in the least, of itself, affect the validity of this marriage. Error about the fortune or family of the individual, though produced by disingenuous representations, do not at all affect the validity of the marriage. A man, who means to act upon such representations, should verify them by his own inquiries; The law presumes that he uses due caution in a matter, in which his happiness for life is so materially involved; and it makes nó provision for the relief of a blind credulity, however it may have been produced. I must, I think, lay all that matter, both in point of fact and in point of law, out of the question; and must consider this case, as confined to the legal question, arising upon the fact of her being married, under the name of *Jackson*, by proclamation of banns, when she had borne the several names that I have recited. To prove a nullity of marriage, it must be shewn, to the satisfaction of the Court, that *Jackson* is an untrue name.

The libel pleaded, that she was the natural and the lawful daughter of *John* and *Ann Mackay*, with whom she is proved to have lived much, and whom she is proved to have treated with great filial affection, as she did likewise a brother and a sister with much sisterly affection. The fact established, however, by the evidence of her mother, and of two other persons who are examined, is clearly what I am bound to take, as the real fact of the case upon this evidence, —that she was the daughter of *Ann Mackay*, whilst a spinster, under the original name of *Jackson*. There is no evidence who was the father of

this

this child; but, at any rate, she is not to be considered as the natural and *lawful* daughter of *John* and *Ann Mackay*.

It was said by the counsel, that the party, having set up a legitimacy, had no right to avail himself of what turned out to be the fact—the contrary evidence of illegitimacy. I am of opinion, however, that Mr. *Wakefield* has a right to use any evidence introduced into the cause by either party, if he can arrive at the conclusion that *Jackson* was not the true name by any other means, and that he has a right to avail himself of the benefit of that conclusion, however obtained.

It occurs to me, that there are three possible ways in which this case may be put, on the one side and on the other. First, that any one of these names was a sufficiently true name, so long as she continued to go by it. Secondly, that none of these names can be considered as a true name; for that the circumstances of her birth and fortune were such, that she never acquired what the law can consider as a true name; and, thirdly, that only one of these several names can be deemed the true name of the party, and that the Court is bound to ascertain *that* name, in order to determine upon the validity of this marriage. That any one of these names is a sufficient name for the purpose, was asserted upon an authority entitled to great respect, namely, that of the Master of the Rolls, Sir *Joseyh Jekyll*, who, in the case of *Barlow* v. *Bateman**, lays down, certainly in very unequivocal terms,—that any one may take upon him what surname, and as many surnames, as he pleases; and for the term during which he uses such

* 3 *Peere Williams*, 65.

WAKEFIELD v. WAKEFIELD.

17th *Nov.* 1807.

such a surname, if he has a right to use it, it is what cannot be denominated an untrue name. I am far from meaning to trench upon the reverence due to any assertion of that great man, when I say, that the solid grounds, upon which this proposition of law is stated, do not appear to have occurred to him just at the moment of the delivery of that judgment — because the reasons stated in that report, can hardly, I think, be deemed satisfactory to produce such a conclusion.

It is stated that the reasons are, first, that surnames are not of very great antiquity. It is pretty well now established, that surnames were fully in use, even among the common people, by the reign of *Edward* the second, which is now five hundred years ago, a pretty reasonable period for the establishment of any legal usage. It is likewise observed, that, in ancient times, the appellation was by the christian name, and place of habitation — as *Thomas of Dale*, but which *of Dale* is of itself merely a surname, a *local* surname certainly, — but not less a surname on that account; for surnames were local, either taken from places of habitation, or descriptive from other circumstances, that belonged to the individuals, to distinguish men who were not at all distinguished by christian names: They are, many of them, general appellatives. Christian names are scattered about among the mass of the people, with such profusion, that convey little or no distinction, and the very introduction of the surname was to discriminate that, which was not before discriminated. It is observed too by Sir *Joseph Jekyll*, that the usage of an act of parliament for a name is but modern. Certainly it is; and

and so are Acts for many other private family concerns: They are of modern introduction. But there has been a practice of great antiquity, that is, the grant of a licence, for the assumption of a name, by the Crown, passing through one of its public offices: Certainly, the ancient style of the ancient offices of the Crown is of great authority upon such a subject. However, I would observe likewise upon the confusion that must be produced, to a degree that would compel a legislative correction; if the practice at all followed this rule, that every one might take what surnames he pleased, and when he pleased: The whole world would be at hide and seek about identity, in the concerns of almost every individual.

However, I am content, as perhaps I ought to be, to take the mere assertion, coming from so venerable a person, confirmed, as it may be, by other authorities of the like kind.—But, taking it as generally true, I think, that the particular case of the marriage act might be admitted to form an exception. The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual, in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights. It therefore requires that the *true* name should be given to them, evidently considering that a name, assumed for the occasion, is a name that will not answer the purposes of the provisions.—Accordingly this Court has conceived itself to be carrying the intention of the law into effect, when it has annulled marriages, where a false name has been inserted in the banns, though no fraud were intended; upon the ground, that such proclamation was no proclamation referring to that marriage,

 but

WAKEFIELD v. WAKEFIELD.

17th *Nov.* 1807.

but to another transaction; the marriage therefore was without proclamation of banns, and consequently illegal. There was a fraud, a want of fidelity and truth, in the application of the banns to the marriage, though there might be no fraud in the original intention. It is therefore, I think, clear, that if there is a true name, that true name must be used; it may be a name less notorious to the world, than some name which the party has thought fit to assume, but is not less the true name on that account; it is the name which, it is presumed, her relations, her parents, her guardians are the best acquainted with, and, therefore, the name which ought to be applied upon such an occasion, provided she is possessed of such name.

But, it may be said, in the second place, that, under the circumstances of this person's birth and fortune, she never did become possessed of that which the law would consider as a true name. It is, I think, a possible case that there may be no true name, ascertainable as belonging to a particular individual. Suppose the illegitimate child of a person of vague and erratic habits, who has been tossed about the world in a variety of obscure fortunes and situations, who has, at different places, been passing under different names, — the child of such a person, at a marriageable age (and that, in the female sex, is a very early age,) may not be possessed of any name, so clearly established. She has none from her birth, and there may be none so clear, as to be depended upon for so serious a purpose, as that of invalidating the marriage.

What would be the rule of law in such a case? In my opinion, it would be that such a person would be out of the statute. The law presumes,

as

as is generally true, that every person has a name; but the law, which presumes that, and calls for that name, does not compel parties to impossibilities; and if the party is not possessed of that which can be considered as a true name, it would not be unfair to judge of the marriage of such a person, upon the old footing of the canon law, which requires banns as matter of regularity, but not as matter necessary to the validity of the marriage. Perhaps those, who have attended to the evidence, and the long and elaborate arguments, which, in this case, have been constructed upon them, may be disposed to entertain an opinion, that this very case approaches something towards that description. Here is an illegitimate child, with very little history applying to the early periods of her life, assuming a succession of five different names before she marries,—certainly it must be admitted, that it is no easy matter to ascertain, what has a right to be considered as the true name of this individual, under all these circumstances.

It may, however, be said, that the legislature has held out, that every person has a true name, and that it is the duty of the Court, in this case, for the determination of this suit, to decide which of these several names is that, which is best entitled to that character.

Five names have been stated — three of those, I think, have been very much dismissed out of the argument; the names of *Lascelles*, *Thorpe*, and *Wakefield*, though she used them for a considerable time; they were all of them presents from Mr. *Wakefield*, the last of them, in consequence of the ceremony of the Roman Catholic marriage, which had taken place between them. But the question

WAKEFIELD v. WAKEFIELD.

17th *Nov.* 1807.

has turned, as, I think, it ought to turn, upon the competition between the claims of the name of *Mackay*, and the name of *Jackson*, which of them is to be considered in the character of the true name of this individual.

I will state the evidence which applies to these names. Six witnesses have been examined, two only of these six witnesses speak of her under the name of *Mackay*. Of the other four, *Pudderphat* and *Garnett* knew her only under the name of *Lascelles*, during the years 1801 and 1802. She lodged with *Pudderphat* during the year 1801, and with *Garnett*, during part of the year 1802, by that name. Mr. *Baster* appears to have known her only by the name of *Thorpe* till she took the name of *Wakefield*, upon the Roman Catholic marriage, on the 6th of *September* 1801. *Turner*, who was a porter at the Inn of Court, carried messages to her from Mr. *Wakefield*; but under what name or names she then passed, or where she was living, this witness does not describe. There are only two witnesses who speak to the name of *Mackay*; the one is a Miss *Gray*, then an assistant to Mrs. *Bayley*, who kept a Roman Catholic female boarding school at *Hammersmith*, who proves, that she was a boarder for an entire year, under the name of *Mackay*, till *January* 1794, being then a child of about eight years of age. The other witness is Mr. *Andrews*, a perfect stranger to the family, but who was introduced to the knowledge of her, by a memorable transaction of her life,— He is the surgeon of the police office in *Bow Street*, and was brought in to attend a child, who had been forcibly violated by a person of the name of *Murphy*, who was afterwards convicted of the

crime.

crime. This was in *August* 1794, and he identified this person to be the child that he had attended, bearing the name of *Mackay*. Copies of affidavits which were then made, in which she describes herself as *Isabella Mackay*, and her mother describes her under the same name, are produced to the Court.

It was observed very justly by the counsel for Mr. *Wakefield*, that this was a very serious transaction; but the name of the party injured was, certainly, not the most material part of this serious transaction; for the crime was the having deflowered a child of that tender age—be it *Mackay* or be it *Jackson*, it made no sort of difference in the offence of the party, or the punishment he was subjected to in consequence of it. These are the only witnesses who speak to the name of *Mackay*, one, during the whole course of the year 1793, the other, in a detached transaction, in the summer of 1794. It is a possible thing, that this defect of evidence may have arisen from the course of the cause; for, having pleaded, as I presume the counsel supposed at the time, that she was a legitimate child, they might, perhaps, have relied upon the presumption of law, necessarily arising from thence, that she must be of the name of her father and mother; but the fact failing, the inference fails, and that fact is as necessary to be proved, and directly proved, as any other fact in the case.

Now there is no evidence whatever, arising from the depositions that are produced, before the year 1793, when she was a child of eight years of age; and this transaction, which I have just noticed in *August* 1794, that applies the name of *Mackay* to her. There is an entire blank in the history from

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WAKEFIELD *v.* WAKEFIELD.

17th *Nov.* 1807.

that time, till she emerges as Mrs. *Lascelles* in the year 1801. It is true, that there is, upon her answer, an admission to this effect, — that she did, at times during her childhood, pass by the name of *Mackay*. In the first place, I must observe, that this admission is that which the Court has hardly a right to notice, because it is perfectly extra-articulate and gratuitous, there being no allegation in the libel, that requires any answer to such a proposition, and therefore the admission finds its way there without any effect. Next, I must observe, that the admission is pregnant with a contradiction; for when she admits that, in her childhood, she passed by the name of *Mackay*, she insinuates that she passed, at other times, by some other name; but that name does not appear. It goes no further than this, — supposing that to be an admission which I could notice, — that, at times, she, as was natural, living in their family, did pass by the name of *Mackay*: Such is the whole amount of the evidence that applies to this name.

Now, what is the evidence that applies to the name of *Jackson?* She is born an illegitimate daughter, the mother gives her the name of *Jackson*, naturally and properly; because, though, in point of law, she is *nullius filia*, yet, in fact and in nature, she is of the blood of the mother, who produced her, and therefore properly and usually designated by the name which the mother bore. The mother swears, that at her birth she was described as *Isabella Jackson*; not, I presume, in the baptismal rite itself, where only the christian name is conferred, but in some register, some record, some formulary or other, that was applied to that ceremony. The mother swears,

swears, that at the other sacrament for adult Christians, she took it under the name of *Isabella Jackson;* it being the practice of the Roman Catholic church to receive the confession of the party in the preparation for it, and to make herself known by her name as a person *duly prepared:* she went through the ceremonials of that holy rite under the name of *Isabella Jackson.* She did other acts likewise of a solemn nature under the same name. In 1804 she is married by a Roman Catholic marriage to Mr. *Wakefield,* as *Jackson,* without any adequate motive for a fraudulent use of that name, as far as appears, or without any reason for it than her own apprehension, that it was the name that properly belonged to her, her mother attending at that ceremony, sanctioning the use of that name, and meaning, most certainly, not to destroy the validity of that marriage afterwards, by the use of an improper name upon the occasion. The mother swears that it was generally understood afterwards, that her real name was *Jackson.* How that may be I cannot say, but this clearly appears, that Mr. *Baster* understood it to be so, because when he gave in the banns, to be published at *Iver,* the year following, he described her as *Isabella Jackson;* therefore he certainly understood, at that time, that the name of this person was *Jackson.* Lastly, when, near a year after the Roman Catholic marriage, she comes to this marriage, she again appears by the name of *Jackson;* — she is proclaimed in the banns, and married under that name.

WAKEFIELD *v.* WAKEFIELD.

17th *Nov.* 1807.

Then taking all this evidence together, that it was the name of her mother; that it was the name

 impressed

WAKEFIELD *v.* WAKEFIELD.

17th *Nov.* 1807.

impressed upon her at her birth; that she has used that name in the most solemn acts of her life, civil and religious, and at various periods of her life, which has not been a long one; I say, taking that evidence, and comparing it with the evidence on the other side, which embraces only a very short period of her eventful life; the Court would not be warranted to say, upon this evidence, that *Jackson* is so clearly demonstrated to be the untrue name of this person, if she did possess a true name, as to destroy the validity of the marriage.

I am the less disposed to sustain the objection to the validity, because Mr. *Wakefield* has his remedy. If it is a nullity, upon this ground, it is a nullity *ipso facto*, and *ipso jure*, under the statute, and which may be pleaded, upon any occasion, in which she claims to be considered as his wife. It is a matter which may be put in issue, and may be established upon other evidence to the satisfaction of a jury, under the direction of the Judge, if he is able to produce such evidence. But, upon this evidence, I am clearly of opinion, that the name of *Jackson* is not demonstrated to be other, than the true name of the party, and, therefore, I dismiss the party from all other observance of justice in this cause.

KIRKMAN *v.* KIRKMAN.

9th *Feb.* 1807.

Divorce, by reason of cruelty, inflicted by the *wife* on the husband, *sustained*.

THIS was a case of divorce, by reason of cruelty, brought by the husband against the wife, "for "violent and outrageous treatment," as set forth in the libel.

JUDGMENT.

Sir *William Scott*.—This is a suit instituted by the husband for separation, by reason of cruelty, and harsh and violent treatment, alleged against the wife. The Ecclesiastical Court is, in general, averse to relax, in any degree, the duties of the contract of marriage; and particularly to release married parties from the obligation of cohabiting together. It will not do so for mere words of abuse, however reproachful.—The persons of both parties, however, must be protected from violence, and I cannot accede, to what has been said in argument, that the Court should wait till there has been actual violence of such a nature as may endanger life. It is not to pause till a tragical event has taken place. Words of menace, if accompanied with probability of bodily violence, will be sufficient. It may be enough if they are such as inflict indignity, and threaten pain. It will be the duty of the Court to say, that the suffering party is not obliged to continue in cohabitation under such treatment.

I am unwilling to go through all the depositions which describe the unhappy scenes in this family. It will not be necessary—as it is perfectly clear, that there have been words of menace, with acts of

KIRKMAN v. KIRKMAN.

9th Feb. 1807.

of violence accompanying them. It is said, that they were caused by jealousy. — All the evidence tends to establish, that there was no foundation, in the conduct of the husband, for feelings of that nature. If such feelings were entertained, with or without reason, jealousy is a passion producing effects as violent as any other passion, and there will be the same necessity to provide for the safety and comfort of the individual. If that safety is en dangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone; it cannot be necessary, that, in order to obtain the protection of the Court, it should be made to appear to proceed from malignity. The evidence establishes, that these parties had gone on, in this unhappy way, for a considerable time; and that after some short separation, they had been reconciled — but the same unjustifiable conduct ensues again; though he conducted himself with the same forbearance which he had uniformly shewn under the atrocious treatment to which he was exposed.

The sister of the wife states, that, on a former occasion, she saw the husband striking the wife, and that the deponent desired her to withdraw, and not stay to be killed. But what follows — The wife (the injured party, according to that account) applies to the husband for reconciliation, promising amendment, and that the same scenes shall not be renewed. The account given by the sister, therefore, is not very consistent with what is the substance of all the evidence, which we have just heard read. The parties were separated, however, and came together again; and if the wife had fulfilled her promise, due care would have been taken of

Kirkman v. Kirkman.

9th *Feb.* 1807.

of the peace of a numerous family, to whose education and advancement the attention of both parents is equally necessary. But the same behaviour is repeated in the grossest reproaches, attacks on his person, and forcible exclusion of him from his own house. If this insulting and outrageous treatment has proved too strong for his forbearance, and may have extorted forcible expressions from him, it is not matter of surprise. I do not remember ever to have seen a case of grosser misconduct, though I abstain from enumerating all the particular facts that are described in the evidence. A few instances may suffice. *Mary Asseter*, a servant in the family, says, "that she lived with Mr. and Mrs. *Kirkman* about " six or seven months; that they appeared to be " very unhappy with each other; that Mrs. *Kirkman* very frequently insulted her said husband, " and called him *rogue, villain, blackguard, dirty* " *dog*, and other still more opprobrious names, and " told him he was too familiar with the deponent, " who, she said, was his bunter, &c.; that he would, " in a kind and indulgent manner, endeavour to " convince his wife of her impropriety of conduct; " but, notwithstanding all he could say, she continued to behave as before; that a short time " before she quitted the family, she well remembers her seeing her *strike him a blow in the face,* " *and tear his cheeks with her nails,* and she was " only prevented from committing further personal violence upon him by an uncle of Mr. " *Kirkman* coming in, and holding her by the " shoulders by force; that the said *Joseph Kirkman* since had told the deponent he would not " live with his said wife, but for the sake of his " children, for he *was really afraid of his wife*; " that,

Kirkman v. Kirkman.

9th Feb. 1807.

"that, on another occasion, she tore either his "coat or waistcoat, and she verily believes, he "lived in a constant state of fear and appre-"hension, from *the violent and outrageous conduct* "of his said wife."

Edward Wilcke, his foreman, in his business of a harpsichord-maker, says, "that he was present when "the said *Mary Kirkman*, without any just cause "whatever, abused her husband most grossly, and "used very bad language towards him, and accused "him of being improperly connected with his fe-"male servant, who was a woman of a very dis-"gusting appearance, and she called him all the "blackguard names she could think of, and that "she prevented the servants from opening the "door to him when he was out;" and deponent further says, "he was once present when she held "a *poker* in her hand, being then in a violent "passion, and threatened to strike her husband "therewith, but she did not; that he also once "saw her scratch her said husband's *face with her* "*finger nails*, which made his face bleed; that, "on another occasion, he went into the parlour, "where he found Mr. and Mrs. *Kirkman* alone "together, she being in a great rage, and a *pewter* "*quart pot* was then lying on the floor, which the "said *Kirkman* told him that Mrs. *Kirkman* had "struck him upon the head with; and deponent "further says, that, in a few minutes after, he saw "her go up to her husband, without saying a "word, and, with her finger nails, tore and "scratched his face, which put him to great pain; "that one evening, some time in *December* 1793, "he perfectly recollects Mr. *Kirkman* shewed a "place, which afterwards became sore, under one

"of

" of his eyes, which appeared burnt, and had some " tallow grease upon it, which he said, Mrs. *Kirk-* " *man* had burnt by *thrusting a lighted candle into* " *his face.*"

Joseph Kirkman, the son of these parties, sixteen years of age, is also produced as a witness to the unhappy state of his family, and speaks with a very credible degree of impartiality respecting his mother's conduct; for he bears testimony to her extreme kindness to her children, when he says, "that " no woman can behave with greater tenderness to " a child, in its infancy, than she has done to all of " them;" but he deposes, "that his mother was in " the constant habit of insulting his father, without " any provocation, frequently accusing him of im- " proper conduct, and calling him *white-faced* " *villain, French villain, scoundrel;* and that when " his father had endeavoured to remonstrate upon " the impropriety of her behaviour, she has conti- " nued her abusive language, adding, 'Do you " want to teach me? I shall do as I like.'"*

This

* Other witnesses depose to a similar effect: — *Ann Connor* says, " that, one evening she saw *Mary Kirkman* strike her hus- " band a *strong blow on the face with her clenched fist,* and that, " a night or two after, she saw her again strike him in *anger,* " *and with violence.*"

Elizabeth Tilser says, " that Mrs. *Kirkman's* temper was a " most *terrible* one, that she was constantly abusing her husband " violently, and calling him a *German brute*, and that, one after- " noon, she heard a great noise in the parlour, and that *Mary* " *Kirkman* called out to her eldest son, '*Joe, Joe, come and see* " *what your pretty father has done, he has scratched his face, and* " *says I've done it.*' That the said *Mary Kirkman* afterwards " confessed to deponent that she had so done." The witness further says, " that Mrs. *Kirkman* locked her husband out of his own " house for *three successive nights.*"

Caroline

KIRKMAN v. KIRKMAN.

9th *Feb.* 1807.

This evidence most clearly establishes, that the wife is not mistress of her own passions; and the Court would be wanting in due attention to the safety of the injured party, in this case, if It did not pronounce for a separation as absolutely necessary for that purpose.

TURNER v. MEYERS, FALSELY CALLING HERSELF TURNER.

6th *May* 1808.

Nullity of marriage, by reason of *insanity* of the husband, brought by himself after his recovery, sustained. — Former proceedings on the part of the father not admitted; the son being of age at the time of marriage.

THIS was a case of proceeding to annul a marriage, on the plea of insanity, instituted on the part of the husband, after his recovery.

JUDGMENT.

Sir *William Scott.* — This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though, at other times, he is pleaded to have been capable. The suit * was first brought by the father, but the son

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Caroline Kirkman, one of the daughters, says, "that her said "mother behaved in an outrageous and violent manner to her "said father, and greatly abused him, that she has often seen "scuffles between them, and once saw her mother *fling a spoon-* "*ful of child's pap* into her father's face."

The libel had pleaded, "that she had damaged a *valuable grand* "*piano-forte, by striking it repeatedly upon the keys.*" — But the Court rejected the article, observing, "that such conduct might "not unfairly be considered as cruelty to her husband, being a "wanton abuse of his property; but that It did not think it quite "sufficient to plead a single act of that kind, done in a moment "of passion."

16th *Nov.* 1804.

* In a suit instituted by *Samuel Turner*, the father of the present plaintiff, to annul this marriage on the same grounds that

son being of age, and there being no means of making the father guardian, or *curator ad litem*, the Court was of opinion, that the suit could not proceed in that form. — It has therefore since assumed its present shape.

Turner v. Meyers.

6th May 1808.

It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own *past* inca-

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that were now proposed, It was objected, on the part of the wife, that the father had no right to bring such a suit, the son being, at the time of marriage, of age, and *sui juris*, unless appointed committee of his person. The Court having taken time to deliberate, observed — That the suit was brought by the father to annul the marriage of a party of competent age, without setting up any special interest, but averring the insanity of the son at the time; the fact being pleadable, the only question is, whether the person before the Court is the proper person to plead it. — It is not alleged that the son is *now* insane; and though under the care of his father, that may be only for weakness, as it is allowed a commission of lunacy cannot be obtained — He is then to be presumed sane, and, as such, capable of bringing suits *proprio jure*: — no man can be plaintiff for him — he must complain; — no man can be defendant for him, he must defend himself; — no one can be attorney or procurator for him, but by his own appointment.

On what ground, then, is the interference of the father to be supported? An analogy to other cases has been relied on, where a *concursus actionum* is allowed. In cases of minority there is a concurrent right, the law gives the father a right of consent, and to the minor a right of protection under his father's judgment. Cases of consanguinity have been also mentioned; but in those the public has an interest — to abate a scandal. The criminal suit is open to every one, the civil suit to every one shewing an interest; but, in that respect, the father is by no means privileged; as he must shew a specific interest as well as any other person — in that case there is a reason for the interference of others, as the marriage can only be affected *inter vivos;* for if the death of either of the contracted parties takes place, the marriage cannot be set aside — here there will be no such consequence, as the remedy may be pursued at any time, only with a little less convenience perhaps

TURNER v. MEYERS.

6th *May* 1808.

incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure *dicta*, in the earlier commentators on the law *, that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion, that prevailed in the dark ages, of the mysterious nature of the contract of marriage,

perhaps than when the whole matter is recent.—To this asserted convenience of the parties, many considerations of inconvenience might be opposed.

It may indeed be questioned what degree of evidence, that could be now produced, would satisfy the Court that the act was the act of an insane moment, when the man, as I have before observed, is not alleged to be insane, and who must therefore be presumed to be himself, has taken no step to annul the act, but rather adheres to it.

In cases of most inveterate malady, there are lucid intervals, on which legal acts may be founded. The case of *Cartwright* v. *Cartwright* (*a*) was a strong case of this kind, in which the will was made in one of these lucid intervals, and was established.—There, indeed, the sanity of the moment was, in a great measure, to be inferred from the internal character of the wisdom of the act itself. This act undoubtedly has no such character of wisdom, being the act of a man connecting himself, in marriage, with a common prostitute, without any rational prospect of happiness. But it will not be conclusive, certainly, against the sanity of the act, that it was an unwise act. The man, in the best exercise of his reason, might not be a wise man; and the question here is as to the sanity of the act, not the wisdom of the party; and I am of opinion, that no evidence would be sufficient to induce the Court to pronounce against the sanity of an act, to which the man himself, not disqualified by proof of insanity, adheres, and from which he does not himself pray to be relieved. On the whole, therefore, I think the father has not a *persona standi* before the Court, and that his suit must be dismissed.

* *Sanchez* lib. 1. disp. 8. num. 15. *et seq.*

(*a*) 1st *Phillimore*'s Rep. p. 90.

marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates *, when the effect of all these *dicta* were brought before the Court, and it has been since acted upon in various cases † in this Court; which it is unnecessary to review. I take it to be as clear a principle of law therefore, at this day, as any can be, and as incapable of being affected by any general *dicta*, which may be found in writers of earlier periods, as any fundamental maxim, on which the Courts are in the habit of proceeding.

When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute ‡; where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the Court will require it to be shewn by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind,

* *Morison* v. *Stewart*, falsely called *Morison*, Delegates, 1745.

† *Cloudesley* v. *Evans*, Prerog. 1763. *Parker* v. *Parker*, 1757.

‡ 15 *G*. 2. *c*. 30.

TURNER v. MEYERS.

6th *May* 1808.

even in a sound state. In disease, where it has pleased the Almighty to envelope the subject matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind.—Under these observations, I shall proceed to examine the evidence, which, in substance, I think I may now say, is sufficient to establish that this gentleman was a person liable to accesses of lunacy.

He appears to have lived with his father, who was a grazier in *Lincolnshire*, and, about thirteen or fourteen years ago, to have been visited with insanity, which became more frequent in its visitations, more especially in the spring and autumn; which is not unusual. The general fact is fully established by the witnesses, particularly those of his own family, his father, his two sisters, and a brother, who was a medical person, and attended him in that capacity at different times. His father did not trust him with any business; he was at liberty, but entirely unfit to be employed. His peculiar humour of madness was, that of passion for a mili-

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Turner v. Meyers.

6th *May* 1808.

tary life, for which he had no disposition at other times; but, at the periodical returns of his malady, he exhibited such flights of heroism, and such general expressions of ideas on that subject, as strongly marked a disordered imagination. His father once offered to procure for him a commission in the army, which he declined, and said, that he would prefer to follow his father's business.

This is the description of several witnesses, who have known him from his infancy, and which brings down this account of him till 1803. It is sufficient, therefore, I think, to throw on the other party, who sets up his act as the foundation of any right, the burthen of proving that it was done at the time of sanity; more especially, as it appears that it was done in *September*, at one of those periods of the year, when he was habitually most subject to his disorder. This brings me to examine the facts attending the marriage. It appears that his father*, who has been produced as a witness, had given him leave to go to a show of cattle, in order to amuse him; that he took that opportunity of eloping to town without money and without preparation; that he told his friend he was going into the neighbourhood of *Nottingham*,

* Consist. 27th *June* 1817.—In the case of *Sumerfield* v. *Mackintire*, as to the competency of a *father*, to be a witness, who had originally instituted proceedings, (to annul the marriage of his son) which were continued by the son, on his coming of age: An objection to the competency of the father to be a witness, was over-ruled by the Court, observing, "that the son's intervention "in the suit was a supercession of the father, and that by taking "up the suit, where he found it, he had adopted and sanctioned "all that had been done. For the sake of greater regularity "however, the conclusion of the cause was rescinded, to enable "the father formally to withdraw himself from the suit, and "then, with his wife, to be repeated to their depositions."

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TURNER v. MEYERS.

6th *May* 1808.

and should return; but he did not: he went to *Newark*, and on to *London*, without any other purpose than that of indulging the military notions, which he usually entertained in his fits of insanity. He is described, by one of the passengers in the same carriage, to have been giddy and flighty, very communicative about his family, as persons of property, but frequently contradicting himself; speaking to every person whom he met, and particularly to women, and calling to any person that he saw at the window. This witness deposes, that at first he supposed him only to be wild and thoughtless, but afterwards he considered him to be deranged. This is a description of very extravagant behaviour. On his coming to town, on the 9th of *September*, he met this lady for the first time, as it is admitted by Mrs. *Turner* in her answers, who was then *Sarah Meyers*, but passing by the name of Mrs. *Lee*. He first became acquainted with this woman, by accidentally meeting her in the street, somewhere near one of the Theatres Royal.

Her servant, *Susannah Squire*, says, "that, on "*Friday*, the 9th of *September*, he came with her "mistress, who lived in *Ann Street East*, and "that almost immediately she heard him say to her "mistress — 'he could not live without her.' That "her mistress then proposed 'that she should go "to church with them,' and on the *Monday* following Mr. *Turner* obtained a licence, and on *Wednesday* they were married." Here is an offer of marriage at once to a perfect stranger. — One has heard of the extravagant effects of love at first sight. — This is conduct, which, if it stood alone, might be only an act of a very weak person, and might not be sufficient to proclaim a man absolutely

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mad or lunatic: it is certainly, however, symptomatic; and if fortified by other acts, may lead to a different conclusion.

The next witness, on whose evidence I shall observe, is Mr. *Parry*, a banker in *Birchin Lane*. He says, "that, on the 9th of *September*, Mr. "*Turner* called on him, and obtained some money, "£15, on the very morning of his coming to town. "On the 10th, he came again dressed in an officer's "regimentals, and told him that he had come to "town to purchase regimentals for a troop of "horse, on which he had expended £400, and "wanted more money. That not suspecting him "to be deranged, he gave him £50. That his "interview was short, and he cannot take on "himself to say that he was insane." Mr. *Parry*, junior, speaks nearly to the same effect — "that "he did not think him mad; that he was not "acquainted with the manner in which he was "usually affected with military ideas; and though "it might surprise him, it did not occur to him "that such behaviour proceeded from madness. "The next day he called again, and said, he was "going to be introduced to the King; but still he "did not think him mad." This opinion of the witness does not weigh much with the Court, knowing, that insane persons are frequently affected with such notions of connection with great personages, when no such connection exists.

It is alleged, on the part of Mrs. *Turner*, "that "she was the cause of this inclination, on his dis-"covering that she was particularly fond of the "military profession, from seeing the locket of a "military officer in her possession; and that he "affected their habits from a wish to recommend "himself to her." But this could not have been

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TURNER *v.* MEYERS

6th *May* 1808.

the cause of them, since they appeared in his first conversation with *Parry*, before he had seen her, and with his fellow-traveller on the road. Mr. *Parry*, junior, says, that the next day, a young woman came to enquire about his character, with a card of reference of a description very wild:— "Royal Army of *France*, Captain *Jonathan Turner*, "of the Royal Guards."

Mr. *Nicholls* also gives an account of a visit to him, "that he dined with him, and talked of "orders for military clothing, and took leave very "abruptly; that, two or three days afterwards, he "dined with him again in a cavalry uniform, and "said, that he had orders to provide clothing for "the whole regiment, and that he wished to be "recommended to an army tailor; that he got up "in a hurry, and in a low voice said, that he had "been a lucky fellow, as he had met with a young "lady of fortune, who had fallen in love with him, "and that he was going to be married to her; "that he went away abruptly, and he then con- "cluded that he was insane."

Oakley, the sister of the woman, says, "that "on the *Monday* he was very desirous to marry "her sister; that he went for the licence, and "was married; and that, during the ceremony, "there was perfect propriety of behaviour; and "that he was perfectly rational, and that it was "his own free act." The Clergyman and the Clerk also depose to the propriety of his behaviour. Much stress, however, is not to be laid on that circumstance; as persons, in that state, will nevertheless often pursue a favourite purpose, with the composure and regularity of apparently sound minds. It is in the extravagance of the act itself, rather than in the manner of pursuing it, that the proof

proof of madness is to be discovered. There is then a letter exhibited, which was written by him to a friend of his father, which has been called for by the wife, and has been produced; but it breathes madness in every line: it describes the lady as the daughter of an officer in the Prince of *Hesse Cassel*'s regiment; and says, "that if his family renounce her, he had engaged to give him a "commission in a regiment of dragoons; and "that, as soon as he should receive their answer, "he should take a captain's commission in the "Prince of *Conde*'s body guards," &c. The same disordered idea prevails throughout.

Other persons are examined on the part of the wife, who never saw much of him. There is the Hairdresser, who dressed his hair once or twice; and the Victualler, who supplied him with dinners; and a person discharged by the wife from debt; and others whose information is much too slight to weigh against the rest of the evidence, which so strongly proves the influence of disorder on his mind.

Mr. *Leadbeater*, the friend of his father, describes his conduct when he prevailed on him with difficulty to come to his house, till his father could arrive to take care of him. When the father comes, he is separated, but undoubtedly expresses a great affection for his wife. When he goes into the country, the same history proceeds. He was put under the care of Mr. *Fawcit*, who proves, that he was deranged for three weeks after, and that he was so again, the next year, at the same period.

On this evidence, I am of opinion, that it is sufficiently proved that he was deranged at the time of the marriage, and that I am bound to pronounce the marriage null and void.

The Office of the Judge promoted by BISHOP, H. M. Procurator General, v. STONE.

13th *May* 1808.

Proceedings under the stat. 13th *Eliz.* c. 12. against a Clergyman, for preaching doctrines contrary to the articles of religion.—*Deprivation.*

THIS was a case of criminal proceeding against the Reverend *Francis Stone* under the statute 13th *Elizabeth*, c. 12., and for maintaining and affirming doctrines contrary to the articles of religion, as by law established. *

The case was argued by the King's Advocate, Dr. *Laurence* and Dr. *Swabey*, in support of the proceedings, and by Mr. *Stone*, who appeared in person to conduct his own defence.

JUDGMENT.

* The citation was in the following words:—*Beilby*, by Divine Permission, Bishop of *London*, To all and singular Clerks and literate Persons whomsoever and wheresoever in and throughout our whole Diocese of *London*, Greeting: We do hereby authorize, empower, and strictly enjoin and command you, jointly and severally, peremptorily to cite, or cause to be cited, the Reverend *Francis Stone*, Clerk, Rector of the Rectory and Parish Church of *Norton*, otherwise *Cold Norton*, in the county of *Essex* and Diocese of *London*, personally to appear before the Right Honourable Sir *William Scott*, Knight, Doctor of Laws, our Vicar General and Official Principal of our Consistorial and Episcopal Court of *London*, lawfully constituted his Surrogate, or other competent Judge in this behalf, in the Common Hall in *Doctors' Commons*, situate in the parish of *St. Benedict*, near *Paul's Wharf*, *London*, and place of Judicature there, on the third day after he shall have been served herewith, if it be a Court-day, otherwise on the Court-day then next following, at the usual and accustomed hours for hearing of causes and doing justice, then and there to answer to certain positions or articles to be objected against him for the health of his soul, and the lawful correction

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H. M. PROCURATOR GENERAL *v.* STONE.

13th *May* 1808.

JUDGMENT.

Sir *William Scott.*—This is a prosecution against the Reverend *Francis Stone*, Rector of *Cold Norton*, originating in a citation in the name of the Bishop of *London*, though the Bishop might be personally ignorant of the existence of such suit. It is the constant style of the Court, and it is not in the power of the Bishop, by any intervention on his part, to refuse the process of the Court to any one, who is desirous to avail himself of it, in a proper case. The suit is promoted by the Procurator General of his Majesty; and, certainly, he is not an unfit person to superintend the management of a suit, which has for its object the maintenance of the established religion of the state. It is not peculiar to this Court, but is common to other Courts, and familiar to every day's experience, that suits for public interests, are in the name and under the directions of the law officers of the Crown. Mr. *Stone* appeared under protest, and the grounds of that protest, as set forth in objection to the citation,

and reformation of his manners and excesses, and more especially for advisedly maintaining or affirming doctrine directly contrary or repugnant to the Articles of Religion, as by law established, or some or one of them, and against the act or statute made in the Parliament holden at *Westminster*, in the 13th year of the reign of her late Majesty *Elizabeth*, Queen of *England*, and so forth, entitled "An Act for the Ministers of the Church to be of "sound Religion," and further to do and receive as unto law and justice shall appertain, under pain of the law and contempt thereof, at the voluntary promotion of *Charles Bishop* Esquire, His Majesty's Procurator General.—And what you shall do, or cause to be done in the premises, you shall duly certify our Vicar General and Official Principal aforesaid, his Surrogate, or other competent Judge in this behalf, together with these presents.

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H. M. PROCURATOR GENERAL v. STONE.

13th May 1808.

have been argued by his counsel *, whose fidelity and ability he has himself fully acknowledged. That protest was overruled †; and it was open to the party to have appealed against that decision, or to have prayed a prohibition; but he has done neither. He has confined himself, in his defence, to a loose verbal protestation, of which it is impossible that any notice can be taken. The Court, therefore, is under the necessity of administering the law, according to the nature and extent of its jurisdiction, on the offence alleged and proved. This offence is laid under the statute 13th *Elizabeth*, "for advisedly maintaining or "affirming doctrines directly contrary or repug- "nant to the articles of religion." These articles are not the works of a dark age (as it has been represented); they are the production of men eminent

* Drs. *Arnold* and *Adams* were employed in that part of the proceeding. Mr. *Stone* afterwards conducted his own defence in a written vindication of the opinions with which he was charged. — The substance of his defence was "that he had done no more "than fulfilled his engagements with his ordaining Bishop; that "he had conformed to the church of *England*, as by law "established, and that he had not offended against the statute; "and that the prosecution was unjust and oppressive."

† The Protest objected "that the citation was irregular and "insufficient in calling on Mr. *Stone* to appear before the Judge, "instead of the Bishop in person; and secondly, that the nature "of the cause, and the quality of the Promoter were not suf- "ficiently explained." The Court over-ruled these objections, holding, "that the Citation was in the usual form; that It might "have issued independently of the statute; and that the words "of the statute "before the Bishop of the Diocese or the "Ordinary" were to be interpreted according to the usual style "and form of judicial proceeding in this Court;" — and on the second point — "that there was no want of due specification."

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for their erudition, and attachment, to the purity of true religion. They were framed by the chief luminaries of the reformed church, with great care, in convocation, as containing fundamental truths deducible, in their judgment, from Scripture; and the legislature has adopted and established them, as the doctrines of our Church, down to the present time.

The purpose for which these articles were designed, is stated to be "the avoiding the diversities "of opinions, and the establishing of consent "touching true religion:" It is quite repugnant, therefore, to this intention, and to all rational interpretation to contend, as we have heard this day, that the construction of the articles should be left to the private persuasion of individuals, and that every one should be at liberty to preach doctrines contrary to those, which the wisdom of the State, aided and instructed by the wisdom of the Church, had adopted. It is the idlest of all conceits, that this is an obsolete act; it is in daily use, "*viridi observantiâ,*" and as much in force as any in the whole statute book, and repeatedly recommended to our attention, by the injunctions of almost every Sovereign who has held the sceptre of these Realms. It is no business of mine, in this place, to vindicate the policy of any legislative act, but to enforce the observance of it. I cannot omit, however, to observe, that it is essential to the nature of every establishment, and necessary for the preservation of the interests of the Laity, as well as of the Clergy, that the preaching diversity of opinions shall not be fed out of the appointments of the Established Church; since the Church itself would otherwise be overwhelmed with the variety of

H. M. PROCURATOR GENERAL *v.* STONE.

13th *May* 1808.

of opinion, which must, in the great mass of human character, arise out of the infirmity of our common nature. For this purpose, it has been deemed expedient to the best interests of christianity, that that there should be an appointed liturgy, to which the offices of public worship should conform; and as to preaching, that it should be according to those doctrines which the State has adopted, as the rational expositions of the Christian faith. It is of the utmost importance that this system should be maintained. For what would be the state and condition of public worship, if every man was at liberty to preach, from the pulpit of the Church, whatever doctrines he may think proper to hold? Miserable would be the condition of the Laity if any such pretension could be maintained by the Clergy.

It is said, that Scripture alone is sufficient. But though the Clergy of the Church of *England* have been always eminently distinguished for their learning and piety, there may yet be, in such a number of persons, weak and imprudent and fanciful individuals. And what would be the condition of the Church, if such person might preach whatever doctrine he thinks proper to maintain? As the law now is, every one goes to his parochial Church, with a certainty of not feeling any of his solemn opinions offended. If any person dissents, a remedy is provided by the mild and wise spirit of toleration, which has prevailed in modern times, and which allows that he should join himself to persons of persuasions similar to his own. But that any Clergyman should assume the liberty of inculcating his own private opinions, in direct opposition to the doctrines of the Established Church, in a place set apart for its own public worship, is not

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more contrary to the nature of a National Church than to all honest and rational conduct. Nor is this restraint inconsistent with Christian liberty; for to what purpose is it directed, but to ensure, in the Established Church, that uniformity which tends to edification; leaving individuals to go elsewhere according to the private persuasions they may entertain. It is, therefore, a restraint essential to the security of the Church, and it would be a gross contradiction to its fundamental purpose to say, that it is liable to the reproach of persecution, if it does not pay its ministers for maintaining doctrines contrary to its own. I think myself bound at the same time to declare, that it is not the duty nor inclination of this Court to be minute and rigid in applying proceedings of this nature, and that if any article is really a subject of dubious interpretation, it would be highly improper, that this Court should fix on one meaning, and prosecute all those who hold a contrary opinion regarding its interpretation. It is a very different thing, where the authority of the articles is totally eluded; and the party deliberately declares the intention of teaching doctrines contrary to them. With these observations on the law, I have only to enquire whether the doctrine, which this gentleman has preached, is contrary to the articles? That will be a very short discussion on the evidence which has been laid before the Court.

The first article states the doctrine of the Trinity; the second, the divinity of our Saviour, and the atonement by his death and sacrifice. It is alleged, that Mr. *Stone* has, in a sermon, publicly impugned these doctrines, and that he has since committed these sentiments to the press. It is not necessary,

H. M. PROCURATOR GENERAL v. STONE.

13th May 1808.

necessary, that I should state the particular terms in which these fundamental tenets have been impugned: The Court has heard those observations repeated more frequently than It wished, and more than could be agreeable, It hopes, to many of the auditors. Mr. *Stone* himself has admitted, and is ready to admit, more so perhaps than those who had the management of his defence, would have advised, the total opposition of his doctrines to the articles in question. I have listened, with patient attention, to what he has offered this day, but I find it little more than a repetition of his sermon. It is not necessary for me to go through the rest of the evidence, or to state the facts in detail. The preaching and the publishing are both abundantly proved.

Then what is the duty of the Court? It cannot refuse its authority to carry into effect the statutes of the land. It might proceed immediately, as suggested by the King's Advocate, after the persisting in those doctrines, which we have heard this day, to pronounce the sentence of the law. But the Court is disposed to act with the greatest indulgence to the party, and will now content itself with admonishing him, though not encouraged to expect any effect from this admonition, to appear the next Court day to revoke his errors, with an intimation that if he does not obey this admonition, the Court will feel itself under the necessity of proceeding to inflict the particular penalty, which the statute directs.

On

H. M. PROCURATOR GENERAL v. STONE. — 20th May 1808.

On the next Court day, Mr. *Stone* tendered a paper*, which he described, on being interrogated as to its contents by the Court, as a revocation of his errors; but the Judge declared, after some observations by Mr. *Stone*, that He could not so consider it, and proceeded to the following effect: —

The only question which I have now to determine is, Whether Mr. *Stone* has, by his declarations this day, either verbally or in writing, satisfied the assignation made upon him — to revoke his error? It is not in my power to accept the written paper as a revocation; it is not really so intended; it would be a want of good faith to the public, and of private integrity, if I were to declare that paper to be a revocation, which is directly the reverse. There is no difficulty in framing what the statute requires, as it is plainly an assurance, that the party, who has offended against the statute, revokes his error. Of what has fallen from Mr. *Stone* verbally, it is not necessary for me to take any notice. He has been heard by all around; and I might leave it to the judgment of those persons, whether, what he has now declared, is not of the same tenor with what he said on the last Court day? In my judgment it is clearly so. I am very certain, that the indulgence of another week would be productive of no alteration in his sentiments. It is only a

* I, *Francis Stone*, Rector of *Cold Norton*, in the county of *Essex*, do declare, that I was not aware that, by preaching my Sermon before the Archdeacon, I was offending against an act of Parliament passed in the reign of Queen *Elizabeth*: and further, I was persuaded that my solemn engagements with the Bishop, at my Ordination as Priest, authorized me to preach as I did. But as the act of Parliament affirms, that I should preach only what is consistent with the 39 articles, I do promise not to offend again in like manner. Signed, *Francis Stone*.

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H. M. Procurator General v. Stone.

20th May 1808.

total abandonment of his errors that can satisfy the law. He declares, that he was not sensible, that, by preaching his sermon before the Archdeacon, he was offending against the statute of *Elizabeth*. With all respect to the personal veracity of Mr. *Stone*, I find great difficulty in reconciling my mind to the truth of that statement. It does appear to me very extraordinary, that a gentleman, liberally educated, who has been forty years in holy orders, should be so ignorant of the fundamental law of the Church of *England*, as not to know the provisions of that statute. But ignorance of the law is no defence whatever. It is not that which can be pleaded by an individual, in defence of any violation of the laws of the land. The second clause of this paper is, that he was well persuaded, that the ordaining Bishop authorized him to preach as he did. It appears to me, that this is an affirmance of his doctrines. When he says, that his solemn engagements authorize him to preach those doctrines, that is so far from a retractation, that it is tantamount to a declaration, that the doctrines, for which he is proceeded against, are agreeable to his notions of Christian faith.

The concluding part is, "I do promise and engage not to offend again in like manner." Who can say otherwise, than that this is a mere promise of *future* silence, but no *revocation* of *past* error? It is no revocation; and that is the demand of the statute. It might be satisfied, if mere future silence was all that is required; but it is no revocation of the past.

I am, therefore, under the painful necessity of considering Mr. *Stone* as having declined to revoke his error, and to comply with the requisition of the

statute;

H. M. PROCURATOR GENERAL v. STONE.

20th *May* 1808.

statute; and I must direct the Registrar to record that the party has not revoked his error. It is only necessary to observe further, that, by the Canons of the Church *, it is prescribed, that when sentence of deprivation is to be passed, which I must declare to have been incurred by this offence, it must be pronounced by the Bishop. †

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* Can. 122.

† In 1714 there was a suit of a similar kind before the Delegates, promoted by Dr. *Pelling* against *Whiston* for Heresy, in publishing doctrines contrary to the Articles of Religion. The statute of *Elizabeth* was not mentioned. In that case, after the Convocation had passed a censure upon the book, Dr. *Pelling* applied to Dr. *Harward*, the Commissary of the Dean and Chapter of *St. Paul's*, to be permitted to promote articles against *Whiston* in that Court. Dr. *Harward* thought, on consideration of the crime, and its legal punishment, — degradation from the ministerial functions, that as he had not his commission from any Bishop, it was not in his power to degrade a Clergyman; and therefore that he had not authority to judge of Heresy, whereto that degradation belonged. He therefore refused the cause, and intimated, that he thought it belonged to the Court of Arches. The Dean of the Arches, Dr. *Bettesworth*, on application being made to that Court, gave it as his opinion and determination, that the matter not coming before him by appeal, as causes ought to do in his Court, and the cause having been already under the cognizance of Convocation, and belonging properly to the Bishop of *London*, he could not receive it in the first instance. Application was then made, in the way of Appeal from the refusal of the Dean of the Arches, to the Chancellor, for a Commission of Delegates: And a special commission was granted, consisting of "the "Bishops of *Winchester*, *Bath* and *Wells*, *Chester*, *Hereford*, and "*Bangor*; Lord Chief Justice *Trevor*, Sir *Robert Tracy*, Knight, "one of the Judges in the Court of King's Bench; Sir *Robert* "*Price*, a Baron of the Exchequer, with Drs. *Wood*, *Pinfold*, "*Pask*, *Phipps*, and *Strahan*." The Court of Delegates held, that the Dean of the Arches had done wrong in rejecting the Petition, and that the cause did lie before him, and that he ought to have entertained it. They further retained the cause, and

thereon

H. M. PROCURATOR GENERAL v. STONE.

20th *May* 1808.

The Bishop of *London* was then introduced, attended by the Dean of *St. Paul's*, and two of the Prebendaries; when, having taken the Judge's chair, He was informed by the Judge of the nature of the offence, and the proceedings instituted against Mr. *Stone*. The Bishop then stated, that he had read the depositions, and was clearly satisfied that the offence was proved; and proceeded to read and sign the sentence of deprivation, which the Judge directed the Registrar to record.

Affirmed, upon Appeal, 24th *April* 1809.

COPE v. BURT, FALSELY CALLING HERSELF COPE.

27th *June* 1809.

Suit of nullity of marriage, *by licence*, by reason of the false description of names, not sustained.

THIS was a case of nullity of marriage, brought by *John Cope* of the *Temple*, Esq. against *Sarah Burt*, spinster, falsely calling herself *Cope*, of the parish of *Saint George, Hanover Square*, by reason of the false description of her name in the licence, under which the marriage was celebrated.

The libel "pleaded the real name of the wife to "have been *Sarah Burt*, spinster; and that she "was described in the licence under the assumed "name of *Elizabeth Melville*, widow; that both "parties were of age; but that the licence was "obtained by the husband, who had been imposed "upon with regard to the name and description of

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thereon issued a Citation to *Whiston* to appear before them, &c. on a certain day,—when articles were exhibited against him, at *the Office of the Delegates, nominatim*. The cause proceeded, and there appears to have been a full argument on the merits of the case: but the suit was afterwards dropt. Vid. *Whiston's* case, published by himself, p. 147.

"the

"the wife*; and that the marriage had in false "names was null and void."

The admission of the libel was opposed by Dr. *Jenner* and Dr. *Edwards*, who submitted, that the identity of the person was in no manner questioned; and as both parties were *majors*, no right had been impugned: that this point had been decided in the case of *Cockburn* v. *Garnault*, before the Commissary of *Surry*, on the 4th of *May* 1792, and afterwards in the Court of Arches, on the 4th *December* 1793.

Court.—I wish to hear how this case is distinguished; for, when I read the libel, it appeared to me that this was a decided point; and I was rather surprised to see it raised again.

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* The Libel pleaded, that, in 1781, *Sarah Burt* quitted her father's house, and went to reside with her sister *Mary Monypenny* in different parts of *London*, and "that upon her going to "reside with her said sister, she the said *Sarah Burt*, falsely "calling herself *Cope*, did assume, without any legal authority "whatever, the surname of *Melville*, and dropped her true name "of *Burt*, and during the time she so resided with her said "sister, used and passed by the surname of *Melville*, but con-"tinued to use and pass by her true Christian name of *Sarah*, "until about the year 1787, when she dropped her said Christian "name of *Sarah*, and from that time, used and passed by the "assumed names of *Elizabeth Melville* until her pretended "marriage with *John Cope*, &c. &c." In the fifth article it was pleaded, "that in the year 1791, the said *John Cope*, Esquire, "was introduced to her the said *Sarah Burt*, now falsely calling "herself *Cope*, under the assumed names and character of "*Elizabeth Melville*, widow, and as such, paid his addresses in "courtship to her in the way of marriage, and that the said *Sarah* "*Burt*, falsely calling herself *Cope*, *fraudulently* concealing from "the said *John Cope* her real names and character, and repre-"senting herself to be *Elizabeth Melville*, a widow, did receive "his addresses and courtship, and consent to be married to him, "and that accordingly, &c. &c."

Cope v. Burt.

27th June 1809.

In support of the libel, Dr. *Arnold* and Dr. *Swabey* contended, that the case cited, was one of peculiar circumstances, and had been directed to be so recorded; that the father was present at the marriage, and, on that account, the Court dismissed the suit. The general features of that case were, that the man, whose true name was *Gerald Garnault*, a widower, had obtained a licence under the assumed name of *George Garnet*, bachelor; and a suit of nullity was instituted by the father of the wife, who was a minor, and afterwards carried on by the woman, on her coming of age. The difference of the name was supposed to be not satisfactorily proved; and the Court, observing on the special circumstance, that the father was present at the marriage, dismissed the cause on that ground. That the impression which that case had left was, that the general point had not been decided; that, on the principle of the marriage act, to which marriages under licence must conform, the true description of persons was necessary. In banns it is specifically required, and the licence, being a dispensation of the ordinary law, was to be considered a personal grant to the parties, founded on a faithful description of their state and condition; and it expressly contained a clause, that if fraud was suggested, or truth suppressed, the instrument shall be null and void.

In reply, it was said, that the true name was required in banns, because the father's rights were precluded by the fact of marriage in that form; and it was, therefore, necessary that sufficient notice should be afforded to him, by a true and accurate proclamation of banns. But in marriages by licence, the father, not consenting, might annul the marriage,

riage, and, therefore, there was not the same reason for holding the licence vitiated, by an inaccurate description of the parties; that it was a general rule of the law of contract, "quod nihil facit "error in nomine cum de corpore constat *," and † "qui cum alio contrahit, vel *est*, vel *debet esse*, "non ignarus conditionis ejus." In the canons respecting licences, 101, 102, 103, there was no restriction as to names; that, in this case, where there was not any imposition in the person, there was no solid objection to the validity of the marriage.

Cope v. Burt.

27th June 1804.

JUDGMENT.

Sir *William Scott*.—This is a libel offered in proceedings, instituted for the purpose of invalidating a marriage, which has been celebrated between *John Cope* and *Sarah Burt*, calling herself *Elizabeth Melville*. The cause of nullity suggested, is, that the marriage was had under the wrong name of *Melville* for *Burt*, according to the description given of her in the licence, which was obtained by the husband, on his oath, swearing that all the requisites of law had been duly observed. I must confess, that I had considered this point to be so much *res adjudicata*, under the authority of the case which has been cited, that it was not without surprise that I received this libel. I was of counsel in that case, and remember to

* Dig. 18. 1. 9. See also ib. § 11. 14. as to *Error, in materia*, in *sexu*; in *qualitate*.—The presumption of law on the subject of marriage is thus expressed, as to *accidental quality*, in the Jewish law: "Ut enim putatur neminem è cyatho potare, quin eum probè "perlustravit; sic et hominem istum existimandum est vitium "novisse, et uxorem voluisse tamen." *Maimonides*, c. 25. sec. 6.

† Dig. 50. 17. 19.

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Cope v. Burt.

27th June 1809.

have urged the very argument which has been repeated on this day; and I conceive, that the judgment then given went to the whole extent of the present question, and would be binding on the Court, even if It entertained any private doubts on the subject.

In that case, two questions were raised, on which it was attempted to set aside the marriage, the want of consent of the father, and the false description of the licence. The *particularity*, in that case, of which so much has been said, was founded on the presence of the father, which might well cure any defect from want of his consent, if no dissent was at that time signified; though if the other point was material, and the validity of the marriage depended on the description of the persons in the licence, any defect of that kind would not be cured by the mere attendance of the father. That case, therefore, is a clear decision upon this very point, which it is not in the power of this Court to disturb, if It was so inclined. The Judge took the distinction between banns and licence, which has been noticed in the argument,—that, in publication by banns, it is essentially necessary that the publication should be in the true name, as it would otherwise be defective in substance, and no one would be put on their guard by such publication; whilst a licence is not of the same notoriety, but is granted by the Ordinary, on the evidence which he is content to receive,—the oath of the party, as required by the canons of the Church.

If there is no deception as to the identity, it may be asked, what is the fraud that is imputed in this case? There was no imposition on the Ordinary, or on the Minister, or on either of the parties,

Cope v. Burt.

27th June 1809.

parties, as the name had actually been used for a considerable time. There is no averment that a licence, obtained in one name, was transferred to another person. If that case should occur, and it should appear that a licence, procured for one person, was transferred to another, it might be a fraud which the Court would be bound to notice. But there is no such ingredient here.

I am of opinion, that this case is governed by that which has been referred to, and that I am bound to hold, that the mere circumstance, that the licence has been obtained in the name of the person, which she has actually borne, though not the true name, will not authorize the Ecclesiastical Court to pronounce such marriage null and void.

Affirmed on Appeal. *Arches*, 5th *February* 1810. *Delegates*, 8th *May* 1811.*

CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

Divorce by reason of adultery. Recrimination of cruelty, as alleged on the part of the wife, not sustained.

THIS was a suit of divorce, instituted by *George Chambers* Esq. against the Honourable *Jane Chambers*, his wife, by reason of adultery.

JUDGMENT.

Sir *William Scott.*—The citation in this cause issued in *Michaelmas* Term 1804, against the Honourable *Jane Chambers* for adultery; to which no appearance was given till *Hilary* Term 1805, after excommunication. A marriage had taken place in 1784, at *Gretna Green;* and the consent of parents being afterwards obtained, the parties were married again in *Yorkshire* for confirmation of the former

* 1st *Phillimore*'s Rep. p. 224.

CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

former marriage: they cohabited till 1799; but not without occasional disagreements and separations. In 1798, the wife absented herself from her husband, and took refuge with her brother, Lord *Rodney*: articles of permanent separation were entered into, which have not been exhibited; but described to the Court as providing, that, "on "the first instance of ill treatment after her return, "of which she was to be the sole judge, she should "be at liberty to separate; taking with her their "two children, without forfeiting an annuity, which "had been left her by Sir *William Chambers*, the "father of her husband, on condition that she "should be constantly living with him."

In 1799 fresh feuds arose: she went away, as it is said, irrevocably; but consented to return to his house for the purpose of taking care of the children, during his absence on military service; and, as she says, with a condition that she should have previous notice of his return. This, however, is denied in his answers on oath. The husband returned without notice; and the libel pleads that she eloped; but whether that is a term properly used, may depend on the agreement under which she claims a right to retire. Till that time, or shortly before, the character of Mrs. *Chambers* was unimpeached; but the libel charges a departure from that character as having commenced with Mr. *Caulfield*, at *Hartford*, near *Huntingdon*, during the husband's absence, and afterwards at other places till 1809, when an action was brought against Mr. *Caulfield*, on which a verdict was obtained of damages to the amount of £2,000. A counterplea has been given, in this suit, on the part of Mrs. *Chambers*, nearly a year after the libel,

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averring many things, some insignificant, some important; and reciting the article of the libel, charging elopement, it explains and justifies that fact under the articles of separation.

This plea describes the situation of Mr. *Chambers* to be one of much pecuniary embarrassment. In it she charges the husband with the profligate design of getting rid of her, by a charge of adultery, — with a constant and causeless jealousy of her conduct with persons, whom he himself had introduced; and concludes with charges of adultery against him with several persons, and particularly in one instance, that must be regretted, that it should be dragged into this suit. It states also, that he had made a proposition to her for a separation, to be collusively obtained. This is denied, in a further allegation on the part of Mr. *Chambers*; and it is there alleged, that she wrote a letter to him proposing, that he should give up the demand of damages against Mr. *Caulfield*, and she would abandon all opposition to his suit. There have also been three exceptive allegations. — Mr. *Chambers*' libel ends with the usual prayer for divorce. The allegation of Mrs. *Chambers* contains no prayer: but, at the hearing of the cause, a prayer is made for separation on her part, and on supposition, as I must presume, that her innocence, and his guilt, should be established. On that prayer, and indeed on every other view of the cause, the first point, which the Court has to establish, is the innocence of her conduct.

Nine witnesses have been examined, who, if they are believed, amply prove the charge of adultery against her. It is proved, by three or four witnesses, that Mrs. *Chambers* came to *Hartford* soon after her husband had left *England* for the *Helder*;

and

CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

and that Mr. *Caulfield* visited her there, and dined and supped there almost every day; and their account fully proves to what a degree of intimacy, their acquaintance had ripened at that time. — They were seen walking in retired places.— He came familiarly to her dressing-room, before she had finished dressing, under pretence of washing his hands, when she sent the witness away. — She was not attended at night by her maid-servant as usual. — The door was locked in the morning. — His boots were observed to be clean in dirty weather, when he came to breakfast; It was believed, that he had then been secreted in the house; and, on one occasion, he was seen getting over the paling of the garden, when he must have come from the house.

One of the servants says, "he saw conduct which "he should have thought very improper in his own "wife." If the witnesses are not discredited, how is this answered? By mere negative evidence of other persons, who say they were present, and saw *nothing* improper. But of these, one is the maid-servant, usually employed in the kitchen, who cannot be supposed to have had many opportunities of making observations. Two others are the sisters of the defendant in this cause, whose evidence the Court would be unwilling to examine minutely, as they may be presumed to be biassed by their affection to her, and by an excusable tenderness for their own characters. When, however, these witnesses say, "*that they "were always with her, and never left her for five "minutes;*" which are the words of the plea, they must be understood with some latitude. If such watching did really exist, it could be only in consequence of some previous suspicion; but, in truth, it did not exist. They do not

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say that they slept with her, which would allow an interval of eight hours at least, and at a time that might be most material.—There is also evidence from other persons that she was seen walking with *him* to *Huntingdon*, and without *them*. The sisters must be understood, therefore, as only expressing, that they were much with her, but, in such a way, as might allow opportunities for every thing, which is stated to have passed by other witnesses. As to the object of his visits, it could not be equivocal, or supposed to be directed towards one of them, as an honourable purpose of that kind would be soon declared, or he would be speedily dismissed.

The subsequent history is carried on in various places, to which she removed, and with no great accuracy, either in the plea or in the proof, as to dates. When she quitted the house of her husband, she is described to have gone off in great exasperation; and, as I think, it appears, from some dispute on account of *Caulfield*. One witness says, "that the husband was particular in his in- "quiries respecting her conduct, when he came "home;" and though this was a stormy period between the parties, as no other cause of jealousy appears, I think she must have been aware that *Caulfield* was the object of his jealousy, as she could not but know the sentiments of her husband respecting him. She knew that he was subject to fits of jealousy, and that it was excited by her intimacy with this individual. What would have been the conduct of a virtuous woman under such circumstances? The dictates of common discretion would have led her to avoid all private communication with him. On the contrary,

CHAMBERS v. CHAMBERS.

26th *Jan.* 1810.

trary, he is continually with her, even up to the time of the verdict in 1809.

It is said that there was the same intimacy with other persons, who were the friends of her family. But in what sense can Captain *Caulfield* be considered in any such character? He was a young officer, casually introduced to her acquaintance by her medical attendant in the country, totally unknown to her brother, and only known to her husband as an object of disgust, and a cause of uneasiness. In what sense was such a person the *friend* of her family? In her own allegation it is stated, "that on one occasion *Caulfield* was sitting "with her and her sister at twelve o'clock at "night." The husband called, and she desired *Caulfield* would go into another room whilst he was there. Why should this have been done, if it was a matter of indifference to the husband? It is admitted, that he continued there after the husband was gone, and after the sister had left the house. The sister says, that he staid till she had finished a letter, which he was to send by the coach. It is proved, that the letter was not so sent; and I cannot but think, that the sister might have staid that short time. Indeed, there could not be a more flimsy pretence for detaining him; and the servant maid says, he staid all night. Then it is said, that this might be mere imprudence, and nothing more; — and that the Court does not judge on such grounds, but on clear proof of guilt.

There may be, I must observe, imprudence of different kinds and degrees, and there are degrees of imprudence, from which a Court of Justice will infer guilt. Here are visits, which are described by her confidential servant, *Sarah Calderwood*,

derwood, as made in such a manner, that did not deceive her. At *Farnham*, near *Bury*, the same witness says, "that he had a bed in the "house constantly for three quarters of a year." Another witness says, "*he lived* there." For a long time, wherever she is, he is there also; and there is one consideration, which extends over the whole history, which is, that here is a young woman separated from her husband, and a young officer constantly together. They are living in the same house, though under the bare appearance of separate beds. What is this state of cohabitation? I am not afraid to say, that separation might justly follow from this alone, and that this might be the legal proof from which the Court will presume guilt; for Courts of Justice must not be duped. They will judge of facts, as other men of discernment, exercising a sound and sober judgment, on circumstances that are duly proved before them. That a young woman, estranged from her husband, and a young officer, should be living together for months, and at different places, though under the flimsy disguise of separate beds, and that Courts of Justice should not put, upon such intimacy, the construction, which every body else would put upon it, would be monstrous.

What would be the condition of husbands under such restraint on legal conclusion? It however does not depend merely on the reason of the thing. It is the doctrine acted upon by the Court of Arches, and in the Court of Delegates, in the case of *Rutton* v. *Rutton**, in which there were separate beds, and scarcely any proof of a fact of adultery; also, in the case of Lord and Lady *Cadogan*†, in which there were separate beds, and

* Arches, 26th *Jan.* 1796. Delegates, 14th *Nov.* 1798.

† Consist. 9th *Feb.* 1796. Vid: infra, 2 vol. p. 4. *Loveden* v. *Loveden*, where this case is more particularly noticed.

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Chambers v. Chambers.

26th Jan. 1810.

in *Denniss* v. *Denniss**, in all of which the same doctrine was referred to. These are authorities which sufficiently support that position, if it were necessary to act upon it. But the evidence goes further in this case.

There is an occasion stated, on which she was compelled to take a house in the name of some other person, and whose name of all others does she adopt? — that of Mr. *Caulfield*. The history also traces them to a cohabitation at *Chertsey*, which I may almost say is admitted, since it is acknowledged by her own witness. The keeper of a lock-up-house, in which she was confined, says, that she always slept with him there; and though some attempt has been made to discredit this witness, by proving, that she did not come in a chaise, or in the particular manner which he describes, the variation weighs but little against the general effect of his evidence. — There is also the verdict, which, though no legal demonstration of guilt against her in this suit, the Court will not lightly appreciate, more particularly as it must have led her to know, that she had been dishonoured by the imputed connection with *Caulfield*.

What then was the natural conduct of an innocent woman under such circumstances? To avoid the man with whose name she herself was coupled in dishonour — to regain her own character; this would have been not only her sense of duty; it would have been the natural impulse. — But what is her conduct? The Court might expect, that it would be impossible that *Caulfield* could ever find admittance to her again. Yet, in her own allegation, she states, that he did visit her, but only as other gentlemen, the friends of her family. I have observed on a similar conduct before. It is out

* Consist. 25th *Jan.* 1808.

of

of all natural credibility, that she could admit, on such terms merely, a man by whose imprudence and treachery she had been involved in so severe a calumny. After this admission, it is almost unnecessary to examine into the credit of those witnesses, who speak to cohabitation there.

The objection to the witnesses is, "that they "stole some articles belonging to her, and told "lies respecting these imputed thefts." This Court cannot try such charges. The only notice which the Court can take of these objections to their credit, is to judge, whether the accounts they give, are inconsistent and irreconcileable.—I think they are not, and that the character of these persons, as witnesses in this cause, is not substantially impeached. After the admission of his visits by herself, I have no doubt, that the cohabitation did take place, which these witnesses describe. It appears further at this period that her sisters had ceased to visit her. What could have produced that estrangement? Here was a woman of noble family, ill used by her husband, consigned to dishonour by the verdict, and in pecuniary distress! What situation could more loudly call for the support of her family?—This has been her conduct out of the cause. What has it been in it? She was called upon by every motive to vindicate her honour, which had been impeached. A suit of restitution of conjugal rights would have put her innocence in issue; and if that was inconsistent with her feelings towards her husband, yet when he brought the suit, she would at least have been eager to vindicate herself. But no appearance is given for her but after excommunication.

In the subsequent pleas, a letter has been introduced, which, whether written in 1805 or 1806,

CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

is immaterial. She had alleged, that her husband had made application to her for a collusive separation, and that she wrote to him in 1805, — to which he says, that it was not in 1805, but in 1806. He had erroneously considered this letter, as connected with one, which was said to have come from her; but that is inaccurate, as it appears rather to have been an original proposition, and weighs strongly against her. Blasted as she was by a calumnious verdict, she had now the opportunity of appearing in a Court, where she might vindicate her character. But what is the letter? "If you will give up the damages against *Caul-"field*, I will give up my defence in the Ecclesias-" tical Court; I have proofs against you which shall " be brought forward before the Court, and before " the world, unless you comply." What is this proposal? but that she will confirm the witnesses of whom she complains, and the verdict, which has consigned her to disgrace; and for what? to save from damages the man coupled with her in this reproach. It is morally impossible that such a letter could have proceeded from an innocent person. Two days afterwards she retracts indeed; but the offer had been rejected, as it had demanded an immediate answer, and none had been sent. This was equivalent to a refusal; and her object, in the second letter, could only be to take off the effect of the first. This letter states, that she had been led to make the offer out of Christian compassion for an unfortunate man, who was reduced to the brink of ruin by subornation of perjury, — but yet she was willing to confirm this verdict.

She speaks also of his continued friendship for her, almost admitting the continued connexion, and

and saying, that no selfish consideration would weigh with her. What! not the vindication of her own character, the best and purest of motives. In the whole of this transaction, I see nothing but the effect of blind passion: I have, therefore, no doubt on the nature of this cause; since these letters are admitted to have been written by her, and it is impossible, that they should be the letters of an innocent woman.

It is not necessary after this, that I should minutely examine the character of some of the witnesses. *Sarah Calderwood* admits her own infamy, in coming, on her second examination, to contradict the first. But I am inclined to believe the first from the tenor of it. It is not a lumping deposition, but discriminative on particular points; and I cannot believe the excuse which she makes for it, "that she was a young woman reduced to "such penury, as to be obliged to eat the bread of "perjury, by swearing against her mistress;" and I advert to this evidence chiefly to make an observation, which I wish to be remembered; — that those who conduct suits here, are answerable not only for their own delicacy, but, in some degree, for that of those whom they employ. There is another witness, *Liddell*, to whom the objection is more slight, as she says only, that her former opinion had given way to later experience.

On the whole of the evidence, I am compelled to say, that the charge of adultery of the wife is fully proved, and that the contrary evidence is meagre in the extreme, except that of the two sisters, to whom many considerations of tenderness are due: And that the conduct of the wife, both in and out of the cause, can only admit of one unfavourable

Chambers v. Chambers.

26th Jan. 1810.

conclusion of guilt. It is impossible, therefore, to comply with her prayer, because, her guilt being proved, she cannot obtain any thing more against her husband than a dismissal from his suit.

The question, then, which is next to be considered is, whether there is any thing proved by her which will bar him from obtaining his prayer. Different grounds are alleged; first, the profligate declarations that he wished to get rid of his wife by her adultery; that he had introduced young men to her, and knew of an improper intercourse between them, which he permitted to go on. But the only witnesses to this charge are the two sisters, and the expressions are those of violence and passion, and referable to jealousy. There is no proof of any overt act of such conduct, to induce me to believe that it was ever attempted. Almost the only evidence of toleration on his part, is in the lateness of the suit, which, he says, arose from pecuniary distress; and the only question could be, in which of the cases this toleration was shewn. Supposing some delay interposed, still, after seeing the evidence which has been introduced into this cause, the Court cannot but think, that some parts of it, which are denied, might yet furnish grounds of prudent deliberation.

The next charge is that of collusion: On this one witness says only that a lady, whom she does not know, came with such a proposal from Mr. *Chambers*. But it does not appear, that she was authorized by him, nor that she did so in the witness's presence. It would be necessary that this person herself should be produced. There is then mention of an offer by his brother; but there is no proof that he was authorized by him;—it is scarcely natural

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CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

that it should be so. If made in consequence of the one made by her, it was an insulting proposal; but yet with this difference, that hers must be considered as an offer to withdraw a defence, which she maintained to be true, his only to take off the effect of what he declares to be false, and in which the Court agrees. It does not appear to have been acted upon. I do not say, that this indiscretion may not be visited upon him in some other place, but, I think, it cannot properly have the effect of barring him from his prayer in this Court.

The third ground is, that of adultery committed by him. One proof to this charge is the evidence of one of the sisters, who speaks of declarations made by him, in letters to his wife, confessing his fault, and soliciting forgiveness; — which fault, if committed, was forgiven, and the letter was burnt. It is to be observed however, that *Hannah Rigby*, who was the object of his supposed attachment, positively denies the fact. The second proof to this charge is one, which conveys an imputation so distressing to the feelings of the family, that I shall pass it over, observing only on the result of the evidence, which I have carefully examined, that it by no means proves the fact alleged against him.

A remaining charge is that of cruelty, which is introduced rather incidentally, and was argued only on the supposition of the proofs of her innocence. But the Court holds her not innocent. On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce for adultery, proved against her, by the plea of cruelty? I am inclined to think, that she would not. It is certain, that the wife has

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CHAMBERS *v.* CHAMBERS.

26th *Jan.* 1810.

a right to say, "You shall not have a sentence "against me for adultery, if you are guilty of the "same offence yourself." The received doctrine of compensation would have that effect, because both parties are *in eodem delicto;* but this is not so in recrimination of cruelty: The *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know, that she would be barred by a recrimination of that species; for the consideration would be very different: The Court might not oblige her to cohabitation, which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, and I take the general doctrine to be, "that a wife cannot plead cruelty as a bar to "divorce, for her violation of the marriage-bed."

It is then less necessary to canvass the evidence on this point very minutely. I do not think, that all vehemence was on his side only. Many witnesses disclaim all knowledge of any such misbehaviour, except from her own represensation. It is not to be denied, that he was an irritable husband; that there was much of violence and intemperate passion in his conduct, words, and attitudes of menace, which might produce present intimidation, and which can be excused only by the madness of intoxication. If the Court was sitting to judge of mere propriety of behaviour, It might see much to censure, though it is not unreasonable to suppose, that much of this may be attributed to the effect of extreme jealousy. He makes many efforts to detain her in his society by humiliation on his part. Mr. *Montagu* says, that he assisted in soliciting her to return, which shews that he had no notion of danger to her: There is nothing else but his return from abroad without notice; and

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26th *Jan.* 1810.

which this Court cannot consider as cruelty. There is no notice taken of such a charge, but in answer to a suit brought against her for adultery. I do not say that the facts are so antiquated, that they might not be deserving of attention, if the suit had been brought against her for restitution of conjugal rights; but, I think, they can have no place as a bar to a suit for adultery, which is fully and satisfactorily proved against her. I feel myself bound, therefore, to pronounce, that Mr. *Chambers* has proved adultery against her, and that nothing is proved against him, which should have the effect of barring him from the usual sentence of separation.

HOLDEN *v.* HOLDEN.

22d *June* 1810.

Divorce, by reason of cruelty of the husband, sustained, on the facts.

THIS was a suit of separation and divorce, by reason of cruelty, brought by the wife.

JUDGMENT.

Sir *William Scott.*—This is a suit for separation by reason of cruelty, on the part of Mrs. *Holden.* The marriage appears to have taken place in 1790; and it is alleged, that, after a cohabitation of eighteen years, she is under the necessity of praying the relief of this Court for protection, as it is unsafe to continue any longer in the society of her husband.

The libel is very diffuse in the matter set forth to sustain this prayer; and many facts, which are there introduced, have been abandoned on proof, as is not uncommon in suits of this nature, from

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HOLDEN v. HOLDEN.

22d June 1810.

want of evidence, owing to the private nature of such injuries, or the inflamed state of the feelings, in which these complaints are usually made. But the question is not, what is *unproved*, but what *is proved*, in the depositions, which I now proceed to examine. I must observe, however, in the first place, that the examination of the witnesses appears to have been much *lumped*, and without sufficient distinction in particular parts, which lays the Court under great inconvenience in considering the weight and force of the evidence. And, on this intimation, the Court expects, that this mode of taking evidence will not be continued.

The husband has given no plea, and has not even administered interrogatories, to which he might have required the answers of the complainant, and have obliged her to speak to circumstances of secret aggression, if he has any such to allege in his defence. The case rests entirely on the evidence of the wife, and, amongst other witnesses, there are the two sisters of the wife, Miss *Allicocke* and Mrs. *Mawer*. The latter has not seen much, and states only, "that she was dis-"satisfied with the general conduct and behaviour "of the husband." The other sister was frequently with them. She describes the husband "as a man of violent passion, with others as well "as with the wife, on various occasions;" and speaks particularly to a scene which passed between them three or four years after the marriage, which excited great terror. On that occasion, she says, "she heard high words between them;" on which it is to be observed, that they might begin with the wife. But nothing of that kind is proved

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or alleged, and the husband has lost the benefit of that suggestion, by not pleading in his own defence, or calling for the answer of his wife, as perhaps he might have done with effect; since it is observable, that some of the servants speak in a manner not wholly unfavourable to him.

HOLDEN v. HOLDEN.

22d June 1810.

This witness goes on to describe, what passed on that occasion, in the following terms: She says, on the fifth and sixth articles of the libel, "that she had "gone to her own room about ten minutes on "retiring for the night, before the parties, that she "heard high words, and the voice of *William* "*Holden*, speaking in a violent passion, and that "the wife came and knocked violently at her "door, and was much agitated, and said, that Mr. "*Holden* was sitting in his shirt, with a pistol on "each side, and desired her to go to him; that "she did so, and found him as described; that he "said he was writing to her father, and she at last "prevailed on him to let her take the pistols away, "and found that they were charged; that she "retired again to her own room; that the husband "came and took from her the child, who had "usually slept with her, and said, his wife would "sleep with her that night, but shortly after came "again, and gave her the child, saying, the wife "would catch cold if she slept in that room." It appears also, that the wife had a peculiar dread of fire-arms; so that the general character of this behaviour, if not legal cruelty, is yet such violence of temper, as is adapted to create great fears as to the probable consequences.

The next fact that is spoken to, is that pleaded on the seventh article of the libel, on

 which

HOLDEN v. HOLDEN.

22d June 1810.

which the same witness says, "that on the 2d "*February* 1808, having gone up stairs, leav- "ing the parties and the child in the front "dining-room, she soon afterwards heard the "husband call out to her to take the child, "which she did from him on the staircase, and, "in a few minutes, heard her sister cry out for "help; that she went down and found her sister "lying on the floor, and her husband standing "over her, having hold of her arms, as if he would "break the same from off the shoulders, apparently "in great agony, and screaming; and on her "remonstrating, he said, if she attempted to "interfere, he would put her out of the window; "and that the next day her sister was much bruised, "and was obliged to send for a surgeon, and could "not put on her night-gown for a week."

Mrs. *Hancock* speaks to the same effect as to the bruises. Now, whatever the origin or occasion of this quarrel may have been, there is nothing to shew, that it proceeded from the wife; and there is enough to satisfy the Court, that very unlawful violence was used upon the wife, from which she has an undoubted right to be protected.

There is another instance in 1800, which, though it is insignificant in itself, does, I think, begin in an act of very froward behaviour on the part of the wife, and which lays the foundation for a suggestion, that all the violence was not on the side of Mr. *Holden* alone. Mrs. *Turner* says, "the wife came to her house on the day men- "tioned, and said that her husband wished her "to dine at home as he was going to have a

"friend,

"friend, — but she thought there was no ne-
"cessity for dining there, and wished to dine
"with the deponent, and did so, although the
"deponent's husband was engaged to dine with
"Mr. *Holden*. — That at night she went home
"with Mrs. *Holden*, and on going into the house
"Mr. *Holden* was greatly displeased, and told her
"she might go from whence she came, and after
"some altercation she did return and sleep at her
"house that night."

It is pleaded also, that a separation took place, for a short time, in 1808; that the husband used urgent entreaties with her to return, promising her that he would not, by words or blows, ill treat his wife again. These terms convey the admission of the fact, that he had given her blows; and it appears also sufficiently from another instance, to which I am going to advert, that this gentleman laboured under that infirmity of temper, which would not permit him to adhere to the promise which he had made. This instance of ill treatment happened in *July* 1808, and is spoken to by Mrs. *Hancock*, who says "that Mrs. *Holden* called on "her, and shewed her her arms, and said she would "not return to cohabit with her husband." The sister confirms this account, and says, "that Mr. "*Holden* came to her, and acknowledged that he "was much shocked at the sight of his wife's arm, "the morning after this had happened." There is also the evidence of Mr. *Foster*, the surgeon, on this part of the charge, who describes her arm at that time to have been very black, and of an alarming appearance, and that it continued so for six weeks. There have been also two servants examined, whose evidence is not very material.

On

HOLDEN v. HOLDEN.

22d June 1810.

On these facts, the Court has to decide, whether the conduct of the husband amounts to that *sævitia* which authorizes a separation.—On this point the Court has had frequent occasion to observe, that every thing is, in legal construction, *sævitia*, which tends to bodily harm, and, in that manner, renders cohabitation unsafe; whenever there is a tendency only to bodily mischief, it is a peril from which the wife must be protected; because it is unsafe for her to continue in the discharge of her conjugal duties; and to enforce that obligation upon her, might endanger her security, and perhaps her life. It is not necessary, in determining this point, to inquire from what motive such treatment proceeds.—It may be from turbulent passion, or sometimes from causes which are not inconsistent with affection, and are indeed often connected with it, as the passion of jealousy. If bitter waters are flowing, it is not necessary to inquire from what source they spring. If the passions of the husband are so much out of his own controul, as that it is inconsistent with the personal safety of the wife to continue in his society, it is immaterial from what provocation such violence originated.

Secondly, The law does not require that there should be many acts. The Court has expressed an indisposition to interfere on account of one slight act, particularly between persons who have been under long cohabitation; because, if only one such instance of ill-treatment, and that of a slight kind, occurs in many years, it may be hoped and presumed that it will not be repeated. But it is only on this supposition that the Court forbears

to

HOLDEN v. HOLDEN.

22d June 1810.

to interpose its protection, even in the case of a single act; because, if one act should be of that description, which should induce the Court to think, that it is likely to occur again, and to occur with real suffering, there is no rule, that should restrain It from considering that to be fully sufficient, to authorize its interference. Here there are repeated acts, diffused over many years, which put the wife in danger, and expose her to great bodily harm. Thirdly, It is not necessary that the conduct of the wife should be entirely without blame. For the reason which would justify the imputation of blame to the wife, will not justify the ferocity of the husband.

On examining the facts of this case by these rules, I think the conclusion which the Court is bound to draw is, that, under the defects which may be left on the case by the absence of all defence, by plea or interrogatory on the part of the husband, the complaint must be considered to be substantiated. The facts are not numerous, nor without intermixture of affection on the part of the husband, and not without some provocation on the part of the wife. Yet, I think, there is sufficient to entitle the wife to the protection of the law, and that the Court is bound to pronounce for the separation, as prayed in the libel.—Separation granted.

*CROMPTON v. BUTLER.

27th *Feb* 1790.

Defamation, the testimony of two witnesses required, but not necessary that they should speak to the same fact.

THIS was a cause of defamation, instituted by Mrs. *Crompton* against Mrs. *Butler*. The libel pleaded to the following effect: "That, during several months of the year 1789, the defendant, "*Butler*, speaking of, meaning, and intending Mrs. "*Crompton*, said and affirmed, several times, these "or the like words,—'that she was a whore;' "with many other scandalous and defamatory "words of the same import and meaning, thereby "charging the complainant with infidelity to her "husband."

In support of the libel, Dr. *Nicholl* submitted, that the words were spoken by Mrs. *Butler* at breakfast, without any previous conversation. She began by saying to one of the witnesses, "Do you know "what has passed? Mrs. *Crompton* has lived with "—— as a common woman." That any words, amounting to the charge of incontinence, were of ecclesiastical cognizance, and would be deemed sufficient to support proceedings of this nature, without evidence of the word 'whore' being used; that the crime was aggravated by the witness reminding the defendant, that the person of whom she so spoke was married; upon which she said, "She would go and tell the husband of it, and "would give half a guinea to have it propagated "amongst her friends." It was proved by *Aire*, another witness, that she went voluntarily into a shop kept by *Crompton*, the husband, and that, putting her head into the passage, she there abused

* The following cases are introduced out of the order of date; as accurate notes had not then been obtained.

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Mrs. *Crompton*, and said, "She had been a whore "for several years." It might be objected, there were not two concurrent witnesses to one and the same act; but it could not be maintained, that two witnesses, speaking to two different acts of the same species, did not supply sufficient proofs of the charge. This has been long held to satisfy the demand of the law on this head. The general principle upon which two * witnesses are required was, that, in regard to the commission of a crime, the presumption in favour of innocence is considered as nearly equal to the oath of one. The Court here had the confirmation of a second witness to

* The inconvenience attending the rule of requiring a certain number of witnesses, or a defined amount of evidence, to make *full proof*, has produced great departures from that principle, in many systems of law, in which it had been adopted.

The difficulty of obtaining *full proof* of offences, according to the civil law, is noticed, amongst the causes for altering the criminal jurisdiction of the Court of Admiralty, 27th *Hen.* 8. c. 4. The following passages shew, how the Rule has been modified in other countries; and, in one particular, in a manner repugnant to humanity and common reason. "Regulariter "tamen in criminalibus causis duo testes plenam faciunt pro-"bationem; nec unicus testis sufficit; quod fallit, quando de "crimine levi et modico agitur præjudicio, atque cum unico "teste præsumptiones concurrunt. Sed si unicus testis plenam "probationem non faciat, sufficit tamen ad semiplenam pro-"bationem; et ut reo, vel *juramentum purgationis*, vel *tortura* "*adjudicari queat*, pro ratione criminum, & qualitate præsump-"tionum concurrentium."—Carpzovius Prac: Crim: Sax: Part 3. Q. 114. § 4. So also as to crimes, *in genere*, distinguished from *specific* crimes, an exception as to *several* witnesses, to *several* acts, was admitted.—"*Secundò*, Quando agitur de probando delicto *in* "*genere*, quod sub se comprehendit species differentes, et actus "particulares, seu successivos—qualia sunt Hæresis, Sortilegium, "seu Maleficium, Adulterium et similia. Quo casu testimonium "testium singularium, quorum unus de hoc, alius de alio, tertius "de illo indicio deponit, conjungenda sunt, ad effectum tor-"quendi reum super delicto, de quo suspectus est."—Ibid. Q. 123. § 53, 54.

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CROMPTON v. BUTLER.

27th *Feb.* 1790.

a repetition of the same act; and there was the presumption, that two persons would not be perjured or mistaken. In such a case, one unimpeached witness to each particular fact would be sufficient; for credit cannot be more strongly supported, than by different witnesses to separate acts of the same species. In cases of adultery, proof by two witnesses to distinct facts is held sufficient to found a sentence of divorce. In high treason itself, though two witnesses are required by statute, different witnesses to several overt acts, concurring to the same treason, are sufficient. If it were necessary to have two witnesses to the same defamatory act, reputation might be destroyed with impunity; the defamer using the precaution merely of spreading a malignant report, but to one person *only* at a time.

On the other side,—It was contended, that though two concurring witnesses to one specific fact might not be required, there was but one witness, in this case, to the general charge; as the evidence of *Aire* must be put out of the question. The substance of his evidence was only, "that a woman, "who was a stranger to the witness, put her head "into the shop, and, addressing Mrs. *Crompton*," used the words above mentioned; and that Mrs. *Crompton* told him it was Mrs. *Butler*; that he afterwards went with *Crompton*, the husband, to a house, apparently not the house where Mrs. *Butler* resided, and he there saw this same person standing in the passage of the house; that this was no proof of the identity of the party, as the mere seeing, in this manner, the same woman, who had used the defamatory words, though she might answer to the name of *Butler*, could not be deemed sufficient for that purpose.

JUDG-

CROMPTON v. BUTLER.

27th Feb. 1790.

JUDGMENT.

Sir *William Scott.*—It has always been considered as good proof of defamation, and as satisfying the demands of the law, in point of evidence, if there are two witnesses speaking separately to facts of defamation, committed at different times. Upon this point, the oldest case that the Court is possessed of is in a note of Dr. *Paul*, of *Hawknell* v. *Lumner* *; since which it has ever been held sufficient, if the two witnesses, whom the law requires to *contest*, should speak severally to different facts of defamation. The rules of law, which have governed the proceedings of the Ecclesiastical Courts, in cases of this kind †, do not require that the term 'whore' should

* 23d *January* 1746.

† The general principles, on this subject, are summarily stated in the following case, decided by Sir *William Wynne*, in the case of *Harris* v. *Buller*, *Arches*, 1st *Dec.* 1798, in which the defamation charged, was for calling the person a common swearer.

JUDGMENT. Sir *William Wynne.*—This is a suit instituted in the Consistory Court of *Salisbury*, by *William Buller* against *Thomas Harris* for defamation, alleged to have been uttered at the times and places libellate. It appears that on the 29th *Nov.* 1794, the proctor for *Harris* alleged the libel was inadmissible, as founded on matter not cognizable in the Ecclesiastical Court. The Judge admitted the libel however, holding that it did contain matter of spiritual cognizance, and that nothing had been alleged to the contrary. There was then a protestation of appeal; but no appeal was prosecuted as of a grievance; and the cause went on for three years and an half, when the final sentence was pronounced, that *Harris* did utter the words charged in the libel, and ought to be punished; and decreed a suitable penance, and condemned the party in costs. Though the Judge so proceeded to sentence, and there was no appeal in the process, on that point in the case; I am clearly of opinion that, if it appears to this Court, that a sentence would not be warranted by law, the Court may, and must

CROMPTON *v.* BUTLER.

27th *Feb.* 1790.

should be the specific word used; for what would, in common and popular acceptation, imply the crime of incontinence, will amount to the same thing; and there are a variety of cases, in which the particular word has not been employed, but some periphrasis, implying the same import: yet it has been held good proof of defamation.

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must reverse it, though the party suffered the cause to proceed, and the objection might have been taken earlier. For it would be strange, that this Court should affirm the sentence, if there was no law, by which any punishment legally attached. There will therefore be a previous question, whether the party has been guilty of any offence for which he is liable to penance.

I do not remember any case, nor find a note of any, in which there has been a proceeding by articles against a person, *for being a common swearer;* and I hold it to be an incontrovertible principle, that only such defamatory words are cognizable *here,* which impute an offence which would be punishable *here.* Can a party then be punished, in the Ecclesiastical Court, for swearing, or being a swearer. The only authority which is relied on is the 109th Canon,—and it is very truly said, that the canons are, in many instances, only declaratory of the law, as what shall be its execution, and not always introductory of the offence. Repulsion from the communion is mentioned in the canon; that, however, is not applicable to judicial proceedings, but rather directory to the minister, who may refuse to administer the sacrament, under the responsibility, that if he does it improperly, he will be liable to an action. The meaning of the canon is only, to bring forward the offence in its proper character; but will not furnish ground for a suit in the Ecclesiastical Court, as authority for such proceeding. There are other offences mentioned afterwards, as sowers of sedition and faction, which certainly do not import ecclesiastical offences, but such as must be prosecuted before the justices of the peace. There is nothing clearer, than that there is no law, or usage, which authorizes proceedings on such offences, in the Ecclesiastical Court. But if the jurisdiction did exist, it is not sufficient merely that the words impute an ecclesiastical

CROMPTON *v* BUTLER.

27th *Feb.* 1790.

The only question then is, whether there is sufficient proof of such defamatory words, spoken by Mrs. *Butler*, at different times. The first witness says, " that on the 23d of *April*, the day " on which the king went to *St. Paul's*, by which " she marks the time more particularly, she went to " work at *Butler's*, a haberdasher; that, while at " breakfast, Mrs. *Butler* asked her, if she knew

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siastical offence, it must be an offence also which will not be punishable at common law. If the words are " that such a per- " son is a bawd," suit lies in the Ecclesiastical Court; but if they are, " that such a person keeps a bawdy-house," they are out of the jurisdiction of that Court; because it may be the subject of indictment:—and though the latter cannot be charged, without charging the other also by inference, it has always been held a ground of prohibition; as the courts of common law have determined, that there can be no suit for defamation in the Ecclesiastical Court, when an action would lie at common law. Several statutes * inflict penalties for swearing. There is also a statute 4th *James* 1. c. 5. against drunkenness, but with an express saving of the ecclesiastical jurisdiction. So in the statute 13th *Eliz.* c. 8. against usury. There is no such saving in the statutes against swearing; and though it may not be necessary in matters of ancient ecclesiastical cognizance, and the authority of the Ecclesiastical Court may not be destroyed by a subsequent statute inflicting temporal penalty, the reservation, in *these* statutes of the same time, being not introduced in *that* relating to swearing, strongly implies, that swearing was not then considered as a matter punishable in the Ecclesiastical Court. For the word drunkard, there have been frequent suits in the Ecclesiastical Courts, and prohibition had often been granted, which was the ground of that reservation. Dr. *Andrew* rejected a libel of that nature, which was a *stronger* case. The Court will not seek to extend its jurisdiction in cases of this kind; and as there is no instance of a suit here for the crime of swearing, for which a punishment has been provided in the courts of Common Law, and restrained to a period of ten days, I am of opinion, that the original proceedings in this case were not warranted, certainly not by practice, and, I think, not by law. I shall, therefore, reverse the sentence; and I should have given costs, if the appeal had been properly prosecuted against the rejection of the libel.

*21 *Jac.* 1. *c.* 20. 6 & 7 *W.* 3. *c.* 11. 19 *G.* 2. *c.* 21.

 " Mrs.

CROMPTON v. BUTLER.

27th Feb. 1790.

" Mrs. *Crompton*, and how long she had known " her; and added, ' do you know what has passed " between her and ——— when her house was " sold? he bought it for her: she was a common " woman to him.' The witness replied, that it was a " pity to say so of a married woman; to which she " answered, she would tell her husband the same, " and offered the deponent half a guinea to acquaint " the friends of the party defamed with what she " said." No defamation can be more atrocious than what is here deposed to. The fact, spoken to by *Aire*, is this, " that he knows *Crompton* and his " wife; that he is a shoemaker at *Tower Hill*, and " went to sell some shoes there; that *Crompton* was " not at home, when a woman put her head into " the passage, and used words that have been " already recited, and that Mrs. *Crompton* told him " it was Mrs. *Butler*."

That, certainly, would not be evidence of the identity, as coming through Mrs. *Crompton*, in a cause in which she herself is the party. It appears, however, that about a fortnight before his examination, he went with Mr. *Crompton* to *Dockhead*, and inquired for Mrs. *Butler*. Some conversation then passed between them. Mrs. *Butler* said to *Crompton*, " what " do you want with me?" to which he replied, "that " he wanted his rent," she having formerly lodged at his house. The witness swears, that she was the same person who defamed Mrs. *Crompton* in his presence, as before deposed. This, I think, is sufficient proof of the identity; and nothing remains but to pronounce the sentence of the law. I am of opinion, that the defamation, proved in this case, proceeds from a very malignant mind. I shall, therefore, enjoin the usual penance, and condemn the defendant in costs.

SMITH *v.* WATKINS.

26th *Nov.* 1792.

Defamation. Words amounting thereto in legal construction; direct terms not necessary.

THIS was a suit of defamation, brought by *Smith*, a married woman, against *Watkins*. The words laid in the libel were, "What do you live with that "fellow for?" meaning *William Smith*, the husband of the Plaintiff. "He has a wife in the country, "that he was married to before he was married to "you, and she is now living in the county of "*York*; and how can you be his wife; and what "must you be to live with another woman's "husband?"

It was objected by Dr. *Nicholl*, that these words did not imply a direct charge of incontinence; that she might not know the fact of *Smith*'s first marriage, and that if so, nothing criminal was done; that the words used seemed to acquit her of any such knowledge, and in that sense, they would not be within the meaning contended for; and that if the inference was false, the charge was not supportable.

On the other side, Dr. *Swabey* contended — that words tantamount, though expressed by circumlocution, had always been held sufficient; and that, whether spoken affirmatively, or hypothetically, or by way of interrogation, or even ironically, if with a defamatory effect, may be the subject of proceedings of this kind; that words, which are really ambiguous, and will fairly admit of a milder interpretation, shall be received in their best sense; but the rule of construing words of an injurious

 tendency,

SMITH v. WATKINS.

26th Nov. 1792.

tendency *in mitiori sensu*, was now held to have been anciently carried too far; and it is doubtful whether many of the earlier determinations, in that respect, would be law at this day. The true rule was, that words, which are ambiguous, must also be of indifferent sense, to be indifferently taken; and that it was so held in *Fleetwood* v. *Curley* *, that when there is a pregnant, violent, and certain sense, that may lead the Court and hearers to take it one way, that shall be taken, and not another imagined, of which there is no appearance; as slander consists in the apprehension of the hearers. That the words here were laid to have been reproachfully and invidiously spoken; and to ask a woman, cohabiting with a man, in a reproachful manner, as pleaded, "How she can "live with another woman's husband, and what "she must be to do it;" raised an inference, which, in the common and popular acceptation of the words, would be as certain as if an express term of infamy had been directly used; that they must be strained to give them a different construction; and that the law knows not the distinction of favourable and unfavourable causes.

JUDGMENT.

Sir *William Scott.*—The Court has no inclination, more or less favourable, to causes of this, any more than to those of any other kind; in point of judicial favour they stand equal, it being equally Its legal duty to entertain them. Certainly there are a variety of cases where the word of infamy has not itself been used: but circumlocutions, implying the same import, have been always held to be sufficient: the

* *Hobart*, p. 268.

meaning

Smith v. Watkins.

26th Nov. 1792.

meaning of the words, however, must be clear and definite, and the Court must be satisfied, that they are not fairly capable of another interpretation. It appears to me, that these words had not that clear and precise meaning, which will be necessary to make them the subject of a criminal charge. If there had been any thing expressed to shew, that the plaintiff was affected with the knowledge of there being any other person, living in the character of a former wife, it would amount to a charge of incontinence; but, otherwise, they will not come within the scope and meaning of defamatory terms to such an effect. The words acquaint her — not with her crime, but with her misfortune — "under "such circumstances, how can you be his wife?" The man might not speak invidiously; and I repeat, that the words do not necessarily import a crime. "And what must you be to live with another "woman's husband?" are expressions which may apply to future cohabitation, if it should take place.

If there was any thing to prove, that these words necessarily implied that she was apprized of the fact of there being another wife, it would bring the case within the authorities referred to; but without you can fix that knowledge, the charge of incontinence is not necessarily implied. I, therefore, reject this libel; but without costs.

BREITHWAITE *v.* HOLLINGSHEAD.

16th *June* 1797.

Tithes, how far a debt discharged by a certificate of bankruptcy.

THIS was originally a suit for subtraction of tithes in the years 1792-3-4, of wheat, beans, and grass land, of the Parish of *Saint Dunstan, Stepney*, in which the party had given an affirmative issue in *January* 1797 — a few days after a certificate of bankruptcy had been granted to him, and he had been decreed and admonished to pay the same as charged. A decree of excommunication was now porrected for non-compliance with that monition on the part of the defendant. It was alleged, that he had become a bankrupt in *January* 1796, since the tithes became due, and had obtained his certificate of bankruptcy in *January* 1797, under which, it was submitted, that he was discharged from this demand among other antecedent debts.

The Court having intimated, that it would be proper that the question should be argued, the party was admitted a pauper for that purpose, — On his behalf Dr. *Sewell* contended, — That the Tithes had become due in 1792-3-4, and the act of Bankruptcy had been committed in 1796, and the certificate obtained in *January* 1797, a few days before the affirmative issue had been given to the libel. That the statute *5 G. 2. c. 30.* § 7. gave the Bankrupt "a discharge from all debts owing at the " time when he became a bankrupt." That in

BREITHWAITE v. HOLLINGSHEAD.

16th *June* 1797.

Baker's case, 2 *Strange*, p. 1152, on attachment for not performing an award, a demand of that kind was held to be discharged. That in 1 *Atk.* 149. it was held, that no preference was due for apprentice fees; but that such a demand was to be proved. It lays on the other side, therefore, to shew that Tithes were not included under the same principle. It was said, 3 *P. Wms.* 24. in a note to the case of *Horsey*, that if there are separate and joint creditors, a certificate on a commission taken out by one concludes all others. As to the time—it had been intimated, that because the debt was in contest at the time, it could not be proved. But the question would not be, whether the particular demand could actually be proved; but whether it was in its nature proveable. If a creditor was out of the country, he might be physically unable to prove, yet the demand was concluded; or, if it was said, that he was prevented by the debt being in contest, it would still be liable to this observation, that if such excuse was admitted, a creditor might purposely delay. In *Cowper's* Rep. p. 25. where judgment on a bail bond, was not given till after the certificate had been allowed, — the Court held, that the penalty had accrued, though execution could not be taken.

In the present case, Dr. *Breithwaite* might have gone before the Commissioners, — whereas he has suffered the dividend to be made: that he might have appeared to prevent the certificate, though he could not prove and prosecute at the same time. He might have opposed the certificate before the Lord Chancellor, and, in that form, the defendant would have been certain of having the full benefit of his privilege; but now, if he

Breithwaite v. Hollingshead.

16th *June* 1797.

was taken under an *excommunicato capiendo*, the party could have no relief from the Bankrupt Laws.

On the other side, Dr. *Nicholl* and Dr. *Swabey* submitted, that this was a suit for Tithes accruing in 1792, 3, 4, in which all possible delay had been used by the party — declining to answer, or to appear, till after the Bankruptcy: and the question was, not whether the party was a solvent or insolvent debtor, but whether the debt was of such a nature as to be proveable under the commission. No statute describes particularly what debts may be so proved. — In awards, annuities, apprentices fees, or penalties, they had actually accrued before; and all questions, as to separate commissions, depended only on preference. — That, in the present case, it could not be said, the debt had accrued in any manner; and therefore, it could not be proved. — *Subtraction* of Tithes was not a debt, but damage, on which only a cause of action arose; but the party could not be held to bail, or have an action of debt brought against him. — 3 *Bl. Com.* 88. That a mere cause of action cannot be proved under a Commission of Bankruptcy, for damages only contingent. * In ejectment, in which there were nominal damages given — the defendant became a Bankrupt before judgment; and in the next term judgment was given, and costs were then taxed; and they were held not to accrue till after the judgment. In the present

* *Cooke's* Bank. *L.* 235. 3 *Wilson*, 270.

case,

BREITHWAITE v. HOLLINGSHEAD.

16th June 1797.

case, there was a mere right of action for taking away the Tithes, which could not be recovered in specie. The party, therefore, could not have gone before the Commissioners, as he could not have ascertained the amount of his demand: as it must be a sum certain, to be so proved. The decree did not pass till after the certificate had been obtained.—The party, therefore, should have pleaded this discharge, if any, when the Court was pronouncing that decree. Having not done so, it was a fresh assumpsit or allowance of debt, which could not be included under a former certificate. It depended on the Bankrupt to make this demand proveable, by his plea, when assigned to answer, and not on Dr. *Breithwaite*. The defendant might have denied that he was Rector; and it could not be foreseen what plea he might offer.

It was scarcely necessary to cite cases to shew, that such a demand was not proveable in the shape of a debt. But there was a case which had happened in the Court of Adm. 1739—in the case of *Russell* and others in the *Adventure*, in which the Court had pronounced for, and had decreed an attachment against the principal and bail. *Martin* appeared for one of the sureties, and alleged that he had become a Bankrupt, and prayed that attachment might not go. Sir *H. Penrice*, after argument by counsel of the common law bar, overruled the objection. From which it is to be inferred, that demands of this nature, dependent on further proceeding or judgment in these Courts, are not proveable before the Commissioners, and are not discharged by the certificate.

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BREITHWAITE v. HOLLINGSHEAD.

16th *June* 1797.

JUDGMENT.

Sir *William Scott*.—This is a suit for subtraction of Tithes for the years 1792-3 and 4, in which the humanity of the Clergyman is sufficiently proved by his forbearance, and the justice of the demand is equally proved, by the decree of the Court which has been pronounced, on the admission of the facts by the party himself.

The only question, therefore, is, Whether he s discharged, as a certificated Bankrupt, from an obligation of this nature; or whether the Court will be justified in proceeding to follow up its decree by excommunication, according to the usual process of the Court, and as it is prayed to do, for non-payment of the sums pronounced to be due, under the former judgment?

The bankrupt laws are well known to be framed with humane attention to the protection of individuals; and though they are very familiar to the experience of other Courts, they do not frequently come under the observation of these Courts, so as to warrant me to proceed, on the mere suggestion of the party, on motion, to entail on a person, who has obtained the benefit of a certificate under a commission of bankruptcy, imprisonment, and all the consequences, that may attend a sentence of excommunication. The Court, therefore, desired to have the assistance of counsel. The question having been very fully argued, it appears to be simply this, Whether a demand of this nature can be considered as a debt proveable under the commission? If so, the debtor is undoubtedly discharged. If not, the certificate will not avail him to this effect.

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The words of the statute are very comprehensive,—"ALL DEBTS," which are large and unlimited; and, I think, the burthen of proof lies on the party who would put a restrictive construction upon them, and maintain, that the bankrupt is not entitled to the benefit of his certificate against a demand of this nature: for the Court must be satisfied, that *he is not* entitled. It will not become me, otherwise, to narrow the beneficial effects of laws, affording this protection and relief from the consequences of misfortune, or imprudence, without the most clear and decided conviction, that the Court is bound to act in that manner. It must be shewn by decided authority, or on admitted principles; and it would have been satisfactory to the Court, if Dr. *Breithwaite* had claimed to be allowed to prove this demand before the Commissioners. As it is, the Court is left to consider for Itself; and I will only say, that the reasonings, which I have heard, do not fully convince my mind, that he might not have proved it.

It has been said, that Tithes, as recovered under these proceedings, are not a *debt*; but in the nature of pecuniary *damages*.—I, however, have not understood that a DEBT, under the Bankrupt Laws, is to be taken in the narrowest construction of the term, and that nothing can be proved, which may not be the subject of *an action of debt*, or assumpsit.

There is a class of cases indeed, which shew, that wherever there is a mere right of action, such a demand cannot be proved,—but the question is, whether the demand for Tithes, under these proceedings, is merely a right of action?

It is said by *Blackstone* and others, that the cases alluded to, are not to be considered as cases of

BREITHWAITE v. HOLLINGSHEAD.

16th *June* 1797.

of debt, but of right of action by which damage accrues. But when the demand is *not* contingent, I see no reason to infer, that the Commissioners would be excluded from the consideration of such a claim, or that the Rector would be debarred from proving it. Whenever damages are truly contingent, or costs to be taxed, requiring the intervention of a jury, or of an officer of the Court, to ascertain the precise amount, they may not be proveable; because there is no certain quantum which can be proved; — that is contingent on the discretion of others, which the Commissioners have no power to ascertain. But on a claim of this nature, *non constat*, that the amount might not be fixed by the Commissioners, and then the legal maxim will be applicable, "Certum est quod "certum reddi potest." If they have the means of ascertaining the amount, I do not see, that the demand might not be recovered before the Commissioners; and it would not be without great reluctance, that the Court could be induced to lay down a position of that extent, that the clergy of *England*, and all lay impropriators, are excluded; and have no right to come before the Commissioners, and partake in the benefit of the Bankrupt Laws.

It has been said, that it is impossible to prove, because the creditor must swear to the amount. But I do not see the ground of impossibility on that account, or that Dr. *Breithwaite* might not swear to such a debt. He has already stated the number of acres, and the cattle depastured, and the grain sown, and he might have the answers of the party. And I do not apprehend, that he would be deprived of the benefit of those answers before the Commissioners. I am not satisfied, at least, that there is

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that want of certainty, and of the means of actual liquidation, that would exclude him from proving before them.

In this state of doubt, it is natural that the Court should feel a strong disinclination to excommunicate a sworn pauper, from whom nothing *can* be obtained; and who might be led to resist the writ at law, with great accumulation of expence, which might be the cause of further inconvenience; and that, after he has been restored to society, and to credit, by the humane provision of the laws, he may be again involved in a *suit*, for which he may again be imprisoned: for I will not say decidedly, that this demand is so clearly within the Bankrupt Laws, as to make my mind easy on that point. In granting the effect of this prayer, I should, in reality, do no benefit to the one party, whilst I might inflict incalculable inconvenience, and hardship, on the other.

Considering the humane forbearance, which has been already shewn in these proceedings, I am unwilling to depart so entirely from that spirit, in the duty which the Court has to discharge between the parties, as to say, that the defendant is liable to all the consequences, that may follow excommunication, if the Court should grant this petition. I am not satisfied, that he is not entitled to his discharge under the Bankrupt Laws, and, on that ground, I shall decline to decree the excommunication.

FILEWOOD *v.* MARSH.

27th *June* 1797.

Subtraction of tithes.—Notice as to setting out small tithes, how far required.—Custom of the particular parish.

THIS was a suit for the subtraction of tithes, instituted by the Rev. *James Filewood*, Rector of *Sible Hedingham*, *Essex*, against *Isaac Marsh*. The libel pleaded, that the defendant, either by himself or his agent, did in the months of *July*, *August*, or *September*, in the year 1794, carry away some barley, of which tithe was due, before the tithe had been duly set forth, or did willingly withdraw the tithe of the same, and converted the same to his own use, without compensation or composition with the said Rector. On the other side it was alleged, "that the tithe was duly and fairly set "forth, but that the said *James Filewood* neglected "to carry it away, by reason whereof the same "became totally spoiled."

JUDGMENT.

Sir *William Scott.*—This is a suit brought by the Rev. *James Filewood* against *Isaac Marsh*, for tithe due in the year 1794. Several circumstances are admitted, viz. the title of the Incumbent, the liability of the land, and the occupation of the party sued. The main fact averred is, that the tithes were not received. To this it is answered, that, although the tithes had not been received, *they had been paid*, for they had been set out, and that such setting out amounted to legal payment; as it was not the fault of the defendant that they had not been received, and he was, therefore, no further liable to this demand. The plea, on the other side, is, that

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though they might have been set out, they were not duly set out, as not accompanied with that notice, which the law requires. The whole question, therefore, is reduced to the simple point, Whether the tithes were set out with proper notice? This question may be considered with reference to three species of law: first, the general law of the land; secondly, the peculiar law of the district, if there is any such; for if there be such local custom, the general law will accept that as the rule in the particular case; thirdly, the law which parties may impose on themselves in their own transactions: since the benefit of the general, or the local law, may be waived by the act of the parties themselves. In the present case, the parties appear to have waived the benefit of the general law.

It is, I conceive, perfectly settled by the authority of the common law, that notice is not necessary respecting the setting out of great tithes. I am not aware of any decision, that has gone so far as to include the case of small tithes, which may admit of a reasonable distinction, on the matter of notice. In great tithes, the Rector has the means of knowing the produce without notice; but, in small tithes, there may be a great difficulty or impossibility of obtaining that information. And if the law, which gives the right, gives also, as is usually said, the necessary means of securing that right, it is not impossible, that a distinction, to this effect, may be admitted in its construction.

It is said, that, by the Ecclesiastical law, notice is required; but it may be a question, which has never received determination, whether this rule may not be superseded by the rule of the common law; and whether the occupier of lands can be bound

Filewood v. Marsh.

27th June 1797.

bound by any rule which the common law has not acknowledged. On this question I am not called upon to decide. There seems to be something of a local custom admitted in the evidence, and in the arguments of counsel. The Rector pleads the practice, though not with the strictness of a legal custom, "that the parishioners or occupiers of "land within the parish do in general give notice "of tithing, on the night preceding their drawing, "or carting away, the produce of their respective "farms;" and the result of the evidence, and the observations, which the Court has heard upon it, is, that the practice of the parish requires, that notice should be given at some time. The question, however, still remains,—what shall be deemed the proper notice, which parties are bound to give, and in which the Rector is bound to acquiesce? It must be a reasonable notice, undoubtedly, so as to afford the Rector an opportunity of *taking a view*; and that must depend, in some measure, on distance, and other circumstances by which that opportunity may be affected.

It is pleaded, "that the parish is large and ex-"tensive, being nearly 30 miles in circumference; "that the Rectory house is situate nearly in the "centre, and that the Rector keeps two men dur-"ing harvest-time, for the purpose of tithing, or "viewing the tithes set out for him as Rector." On the face of this statement, which is not contradicted, the custom, set up by the parish, to give notice only "a very short time previous to their "carrying away the corn from off the ground," is untenable, and would oblige the Rector to keep a host of tithing men. If the notice is such, that the party cannot act upon it, it amounts to nothing.

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It will not be sufficient, however, to say only that it must be reasonable. For who shall judge on this point? The parishioners will be inclined to hold less notice sufficient, than may appear to be so to the rector. It is, therefore, desirable to see, if the custom of the parish may not be traced out with more precision, so as to afford a plain and just rule for all parties. It is pleaded, that they do, *in general*, give notice; which is an admission, contrary to the result of a great deal of the evidence, which has been given in this cause. Many witnesses say, that it is given in the morning; others, at noon. Some, that it is accepted as a favour, and as an accommodation; others say, that where lands are near the rectory-house, the practice is not observed. From all this it may be inferred, that much irregularity has prevailed on this point, and even since the commencement of this suit. The only result, which I can draw from the evidence is, that the practice has not been exactly that for which either party contends. The parish maintain in their plea, that no notice is due; yet the whole evidence clearly proves the universal sense of an obligation of giving notice.

The Rector pleads, "that notice should be given "over night;" but when I look back to the evidence of persons speaking to a considerable distance of time, I find, from the deposition of *Bullard*, who lived fifty years ago as servant to the Reverend Dr. *Sneyd*, who was at that time rector of this parish; "that, at that time, it was the general "custom of the parishioners, or occupiers of land "within this parish, to give notice of tithing on the "night preceding their drawing or carrying away "the produce of their respective land, when they "intended to draw and carry the same in the morn-

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FILEWOOD v. MARSH.

27th *June* 1797.

"ing, and to give such notice in the morning, when "they intended to carry and draw the said produce "in the evening." There are many witnesses who confirm this statement. On the whole, I am led to this conclusion, that notice ought to be given in this manner; and if there should be any other suit brought from this parish, the Court will consider this to be the notice, which is required to be given.

If the question rested here, I should be bound to hold, that sufficient notice had not been given, and to condemn the defendant in the payment of the tithes and the costs. There are, however, two considerations which weigh much with me. If the custom has, by the indulgence of the Incumbent, been suffered to sleep, and go into disuse; if he has accepted notice in the morning for noon, and at noon for evening; when it is deemed expedient to renew the ancient practice of the parish, it is proper that a warning should be given also of this, that such irregular notices would not in future be accepted. Such an intimation appears to have been very properly given by the rector in 1796, and is undoubtedly a more preferable course than that a suit should be commenced immediately. Considering, therefore, the general indulgence which seems to have obtained, it does not necessarily follow, that the party in this case having given the usual notice, according to the then subsisting practice at the fixed period, would be liable to the payment of the tithes and the costs; for it may be fit to consider the effect of the third species of law to which I have alluded, — the law which the parties have imposed on themselves. The farmer may have submitted to the obligation of giving longer notice, and the rector, by his own

acts or that of his agent, may have bound himself to be content with shorter. The Court then must consider the conversation which passed on this subject, as it affects both the giving and the acceptance. Mr. *Filewood* pleads, " that the field is at " the distance of three or four miles from the " rectory-house, and that the defendant, in order " to deprive him of the opportunity of viewing, did " not give notice until between nine and ten " o'clock in the morning, that the barley was " tithed, or ready for tithing, and would be carted " or drawn from off the field that day; at which " time the said *Isaac Marsh*, or his servant, was " informed that the tithing-man, who attended on " that part of the parish, went from home at six " o'clock in the morning, and, as the fact was, " that he was towards that part of the parish " where the said field of barley was situate; that " the servant of the said *Isaac Marsh* undertook to " enquire for him, (the said tithing-man), which " he did not."

Here, then, is an imputation of neglect, in having engaged to give notice to the tithing-man, which was not done. This account is supported, in some degree, by *Mary Farrow*, who says, " that " she is servant to Mr. *Filewood*, and that in her " presence and hearing, *John Stanning* told Mr. " *Filewood*, that *Shelley* had been there to desire " him to come to view *Marsh*'s barley; that he " had told him, he could not go himself, but that " *Francis Palmer*, another tithing-man, was then " at that part of the parish where the barley lay, " and that Shelley had replied, he would go and " look for him, and get him to view the tithe." But the material fact is not proved, that there was

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FILEWOOD *v.* MARSH.

27th *June* 1797.

any real contract or engagement, either that one undertook to look for the tithing-man, or, on the other side, that the tithing-man was in that part of the parish in which was this field of barley. On the averment of the engagement, it is not proved, that the servant was actually in that part of the parish. If this had been proved, and the point had rested on the depositions of *Farrow* alone, I should have held, that the contract had not been fulfilled. But there is much contradictory evidence on this fact, as *Shelley* deposes, "that he was "sent to give notice about seven o'clock, that the "barley would be ready at ten."

Some objection has been made to the nature of the notice to the tithing-man at the parsonage-house, which must be laid out of the case, because I think that is to be considered as legal notice to the party himself. *Shelley* says, "that he gave notice to *Stan-* "*ning*, who replied, that he would tell his master; "and then added, that *Palmer*, the tithing-man "usually employed for the side of the parish where "the field lay, was not then at home, but that he "would be at home at breakfast-time, and he "would then inform him of such notice; but the "deponent denies, that he ever said he would un- "dertake to inquire for him." The evidence of *Stanning* is, "that he remembers one morning, about the "middle of *August* 1794, whilst he was at breakfast "at the parsonage-house, about seven o'clock, a "man of the name of *Shelley* came and told the de- "ponent, that Mr. *Marsh* had a field which would "be ready for tithing about ten o'clock on that day, "and requested the deponent to go down about "that time to view the tithe; to which he replied, "that he could not possibly come himself, but he "would

"would take care to send a man; that *Shelley* then "requested the deponent not to fail to do so, to "which he replied, that he would not fail." This is the substance of the accounts of the conversation that passed, and I think that they are not inconsistent; though it is less necessary to consider this more minutely, after what has been stated in the plea, and deposed to in the evidence of *Farrow*.

In what follows, I do not see any appearance of *mala fides* in the conduct of the defendant. Much has been said about a combination against the Rector, and it is pleaded, "that this was done for "the purpose of rendering the taking of tithes as "inconvenient as possible." But there is no proof that *Marsh* was a party to *any agreement* with others; much less to any such combination as has been pleaded. It cannot, I think, be inferred from the mere shortness of the notice alone; since it appears, that Mr. *Filewood* had been in the habit of taking shorter notice by indulgence and accommodation to the farmer. It appears also, that some inquiry was actually made for Mr. *Filewood*, or for the tithing-man, when the barley was ready; and that some time was lost in waiting for the tithing-man. Application was also made to a servant of Mr. *Filewood* to view the tithes that were set out; and the barley was left till the afternoon. It has been said, that it was the duty of *Marsh* to send again, as there must have been some mistake; but I cannot say, that there was any such legal obligation. Notice had been given and accepted, and communicated to Mr. *Filewood*. It was, at least, as incumbent on him to send to say, that he did not accept the no-

 tice,

FILEWOOD v. MARSH.

27th June 1797.

tice, and to warn them not to cart away, as it could be on the farmer to send again.

Another ground has been taken, and it has been said, that as the corn was not ready at the time fixed in the notice, the notice was void. The rule of law is fairly laid down, that notice for a time when the corn is not ready, is void; but the variation must be material, and not merely arising out of a small delay, which will occur in all business, of a quarter or half an hour. I do not see any such deviation here. The notice was given for ten o'clock, and it is proved that the corn was ready before eleven. It would be going too far to say, that the time was so distant as to vitiate the notice which had been given. The only remaining question then is, as to costs. If I had reason to think that the prosecution was vexatiously begun by Mr. *Filewood*, and continued, notwithstanding better advice, it would have great weight in this part of the case; but I do not draw any such conclusion from the facts which have appeared in evidence. It appears, that messages were sent through servants, which might, very naturally, lead to some mistake; and it may have been owing to mistake, that the facts necessary to support Mr. *Filewood*'s plea, to the full extent, have not been proved. It may have been of service to the parish to lay down a rule for their future guidance, which may prevent litigation in other cases; I shall content myself, therefore, with having done this, and I shall not give costs.

FILEWOOD v. KEMP.

7th *May* 1805.

Subtraction of tithes. Composition not proved. See particulars, as to tithes of crops sold, whether due from the vendor; also as to barley-rakings, mills, etc.

THIS suit was brought by the Reverend *James Filewood*, Rector of *Sible Hedingham*, in the county of *Essex*, against *John Kemp*, a parishioner of the said parish, " for taking, withholding, sub-" tracting, and converting to his own use and " profit, the tithes and tenths of milk, calves, pigs, " carrot-seed cut and rubbed out into bags, barley " rakings, two mills for grinding corn, and for " clover and grass mowed and used green," &c.; " without compensation or composition to or with " the said *James Filewood*."

An article in the libel also set forth a demand for after-pasture of fields, for which tithe of hay had already been paid; which article was rejected by the Court. *

On the part of Mr. *Kemp*, an allegation was admitted, pleading, " an agreement entered into with " the said Rector, for a composition in lieu of tithes " of milk and calves, after the rate of eight shillings " for every cow fed and depastured, and also one " shilling for each pig farrowed, as a composition " for the tithe of all pigs; and the sum of four " pounds ten shillings in lieu of all mills in his pos-" session, whether worked by wind or water, and also " for tithe of all poultry, and for *Easter* offerings; " as well as one pound one shilling, as a composition " for the tithe of an orchard garden:"—" That as to " the carrot-seed, it was sold standing, and be-" fore the same had been cut or rubbed out."

The case was argued by Dr. *Nicholl* and Dr. *Swabey*, for Mr. *Filewood*, and by Dr. *Arnold* and Dr. *Adams*, *contrà*.

* See also the case of *Batchellor v. Smallcombe, 3 Mad. Rep.* 20.

FILEWOOD v. KEMP.

7th May 1805.

JUDGMENT.

Sir *William Scott.*—The first point, that it is necessary for the Court to decide in this case, respects the averment of an agreement between the parties; and, undoubtedly, the burthen of proof, on that fact, lies on the person setting up the agreement, that is, the defendant in this case. The Clergyman stands on the general law. The agreement, therefore, is matter of special ground of defence, which must be minutely and specially set forth and proved. What, then, is the proof offered? A fact, respecting which *Burleigh*, who describes himself as *Kemp*'s clerk, speaks, bears strongly against any such agreement. What is there besides? Only the declaration of *Kemp*, on one side, and of Mr. *Filewood* on the other. Taking it at the lowest, that they are of equal credit, the result of their declaration is contrary one to the other, and the burthen of proof, I have already said, lies on the defendant. There is no principle on which I can say that the agreement was proved. It is said, that a verbal agreement would be sufficient, and perhaps it might; but still means should be used to ascertain it more particularly, when it is an agreement between persons who appear not to have been on such terms, as would lead to any agreement.

On these different representations, it is impossible for me to pronounce for the effect of any agreement; and I think, the fact that *Burleigh* was employed by *Kemp* to go and put the matter on a different footing, is a direct disclaimer, an *evidentia rei*, which disproves the allegation of an agreement. The witness says, "that he was "authorized by his master, *John Kemp*, to pay or "make

FILEWOOD v. KEMP.

7th May 1805.

" make satisfaction to the said *James Filewood* for " all the small tithes due to him, and to make a " tender of ten guineas in gold for a compensation; " but that the said *James Filewood* would not see " the deponent upon the business." I, therefore, proceed to consider the several particulars in detail of which the demand is composed. The first article is a demand of ten shillings for the milk of two cows, and six shillings for one calf. There are different accounts of the value of the calf, arising, perhaps, according to the purposes for which it may be bred; but, I think, when rated at the value of three pounds, that cannot be called an unreasonable estimate, particularly in *Essex*, where more than usual attention is paid in the management of that animal. The next is a sum of eight shillings for twenty-five pigs, which I am to suppose not overvalued, at the time when they are titheable.

The next article relates to carrot-seed*, on which a preliminary question is raised, Whether the tithe is to be demanded of the occupier, or of the persons to whom the produce may have been sold. Some old cases have been cited to shew, that the Clergyman must look to the person to whom the crop is sold; but unless the authority of decisions of the common law is very explicit, and likewise recent, I should be disposed to hold the principle, which was adopted by my predecessor, that such a rule is not a correct measure of justice. The inconvenience must obviously be great, and the multiplicity of suits in which the

* Authorities referred to in this part of the case were,—*Moyle* v. *Ewer*, Cro. Jac. 362, and 2 Bulstr. 183. *Lockin* v. *Davenport*, 2 Gwillim, 472. *Grant* v. *Hedding* and *Ball*, Hardress, 380. 2 Gw. 515. 3 Burn, 490.

Clergy-

FILEWOOD v. KEMP.

7th *May* 1805.

Clergyman may be involved, would inflict a great hardship upon him, if that rule was to be supported, as the tithe might be sold to a number of different persons, to obscure strangers, who might not be easily discovered, and who might be less solvent than the person from whom they were purchased. Unless, therefore, I am restrained by the authority of modern cases, I shall adhere to a different rule, and hold the occupier to be liable.*

We well know, that in different periods of our history, in the conflicts between the civil and ecclesiastical jurisdictions, there has been a strong current of opinions in opposition to the doctrines of the Ecclesiastical Court, as being too favourable to the clergy. Prejudices are now worn away, and such questions would only be viewed at this time upon the sober principles of justice and equity. If then there is not the authority of modern decisions, the older cases alone would hardly controul my judgment. But, in the present case, the party has renounced the benefit of such an objection, by the tender which has been made, and without any reservation of the question in the way of protest.

Another material question also relates to the point, whether the Clergyman is concluded by the actual price obtained by the sale of the crop? I think that he is not, since there are many inducements, that might concur to make the price fair and reasonable between the parties, though it might not be a just criterion of value as to the tithes; and the parties being different, it cannot be maintained,

* In the case of *Filewood* v. *Burleigh*, Consist. 16th *Feb.* 1813, on tithe of hops, on lands still continuing in the occupation of *Kemp*, claimed against the *purchaser* of the crop: It was held, that the vendee also is liable at the option of the Clergyman.

that

that the Clergyman is bound and concluded by a contract between other persons.

A third question is, whether it should be tithed as rubbed out? On that point, I think it should not be so taken; as that is a subsequent process after removal. The clergyman has to look to the value at the time when the crop is cut; and therefore the expence of rubbing must be deducted. Under this observation, I think the value may be taken, by the evidence, at about two pounds, two shillings, per hundred weight, deducting the charge of rubbing and bagging and carrying to market.

The next article is that of barley-rakings, on which I have no hesitation in saying, that I conceive the law to be, that the Clergyman being entitled to one-tenth, is entitled also to the rakings of every tenth cock, as composing part of the proportion belonging to him; — this raking ought, undoubtedly, to be done by the farmer's servant. If the Clergyman has paid for it, it is an expence for which he is entitled to an allowance.

The next article is for mills, on which a compensation is offered, as the one-tenth of the clear profit upon the average of the whole year. It has been said, that this being a demand for profits during particular months, it is impossible, that it should be estimated in any other way, as it is proved, that no profit was actually made during those months. It is contended, that the profit must be the clear profit. I am not, however, aware on what authority that principle is attempted to be substantiated. I have always entertained the notion, that the mode of tithing, on this article, is by the tenth toll dish; as the general management of a mill may be very improvident in the employment of servants, and in

other

FILEWOOD v. KEMP.

7th May 1805.

other particulars by which the Clergyman ought not to be affected. It would be necessary on such a principle, that he should keep an account of the whole concern, which is no part of his duty. The owner is to look to other considerations to see that the result shall be advantageous to himself. There being, in this instance, no opposition as to the amount, and having no other criterion but the admission of the party himself, I shall adopt that, and pronounce for the sum, £4 10*s*. The composition for poultry and *Easter* offerings, which are alleged to be included in that sum, must be paid for separately, and taken out of the article.

The next demand is for clover and grass, repecting which, it is said, that some was cut for the horses which were used in agriculture. It is admitted, however, there were many horses kept for other purposes. As to horses kept for agriculture, I understand the rule of law to be, that no exception is allowed for such horses, unless where there is no other food for them. * It is not sufficient, that the horses are kept for agriculture, unless it is proved, that the clover and grass so cut was their only fodder; notwithstanding the objection, that has been stated by Dr. *Arnold*, that horses employed in producing the crop are to have their feeding allowed out of the general crop, as the farmer would otherwise be obliged to account to the Clergyman, as to his manner of feeding his cattle. I think, however, the authority of the case, which has been cited, is decisive, though I accede to the observation on the equity of the principle, that where horses are fed on hay, and that

* 4 *Gwillim*, 1411. 1 *Roll's* Abridg. 605.

hay

hay has paid tithe, tithe is due also for the clover, if the farmer makes that a substitute for hay. There may perhaps be some inconvenience in acting upon this principle, but here is a broad principle of justice; and there is also, what I am perhaps fully as much bound to adhere to, *viz.* the determination of a modern case in the Exchequer.

The next article sets forth, that the defendant ought yearly to have paid the sum of two-pence to the Rector, for himself and every person of his family above the age of sixteen years, for *Easter* offerings and other obventions; and that in the years 1801 and 1802 he had fifteen persons in his family above that age. This has been met by a plea of composition, which, as I have before suggested, is not established to my mind.

On the question of costs, I am under the necessity of observing, that the opposition to this demand has been rather vexatiously and unconscientiously made. A composition has been set up, which has totally failed, and the Clergyman being put to prove his title on every article, has failed only on one. I am of opinion, therefore, that, according to the ordinary course, he is entitled to his costs. *

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* On the subject of the tithe of mills, the attention of the Court was more particularly called to the authorities of the modern practice, in the Court of Exchequer, on this point, in a subsequent suit between these same parties, in which the Court held that the mode of tithing by the tenth dish, was not now in force, vide the next case.

FILEWOOD *v.* KEMP.

9th *Feb.* 1807. Tithe of corn mills, by *the tenth toll-dish*, not sustained. The *net profit*, now held to be the rate of tithing.

THIS was a suit between the same parties as in the preceding case, in which a libel was given in on behalf of Mr. *Filewood*, setting forth a demand for the tithe of mills, in the occupation of the defendant, *by the tenth toll dish.*

JUDGMENT.

Sir *William Scott.*—The present question arises on a libel given by the Rector against a Parishioner, in a suit for tithes, in respect to the tithe of mills. The Court has intimated an opinion in a former suit*, that the tithe of corn mills was payable by the tenth toll dish, as the demand, in that case, rested originally on an agreement; and the Court pronounced for the sum demanded, though the agreement itself was not established; and no objection being made to *the amount of the demand* for tithe, and the whole subject having been now laboriously argued again, the Court does not hold itself bound by a judgment, formed, in great part, upon another consideration.

The erection of mills, in many parts of *Europe*, was originally made by persons possessed of feudal rights, as an act of charity; and those who were subject to feudal tenure, were permitted to grind at them gratuitously. It is on that footing that ancient mills are exempted from the payment of tithe: As there was no profit made, they could not be justly liable to tithe. Sometimes the tenant made to his lord the acknowledgment of a toll dish. The quantity might vary, as feudal services

* Vid. preceding case.

were

were very various in their nature and amount. When, however, mills began to be constructed for profit, there was a great struggle between the spiritual and temporal jurisdictions, whether mills were titheable at all or not? The statute of *Articuli Cleri* * settled that point, and ever since they have been held titheable. Afterwards discussions arose, whether this tithe was prædial or personal? I accede to the argument of the defendant's counsel, that they are not merely prædial in their nature. Tithes are considered prædial, by reason of the natural increase of vegetable substance in the earth, that is, *in prædio*. The plaintiff's counsel contend, that, in a corn mill, there is a change produced, which may be compared to a sort of renovation of the corn, by the action of the elements, producing a profit. The action of the elements, however, is not upon the corn, but *ab externo*: the elements infuse nothing into the corn; there is no renovation of the corn; no increase of its substance.

The case of *Newte* and *Chamberlayne*†, in 1706, is the foundation of the modern law upon the subject. That case was first determined in the Exchequer; and that Court held the same doctrine as the Ecclesiastical Courts, that a mill was titheable by the tenth toll-dish, as being a tenth of the Miller's gross profits. That case went, however, to the House of Lords, where seven Judges gave their opinions against that decision, Mr. Justice *Powell* being absent, and the Barons of the Exchequer adhering to the opinion they had already given. On the opinions of the seven Judges, the

* 9 *Edw*. 2. st. 1. c. 1.

† 7 *Bro*. P. C. 3

FILEWOOD v. KEMP.

9th Feb. 1807.

decision in the Court of Exchequer was reversed. That was the case of a horse malt-mill; but I cannot find any thing, in the reasoning of the parties themselves, as annexed to their cases, or in the reasoning of the Judges, which limits the principles of that case to such a mill only.

In all mills, there must be animal force of some sort, either brute's force or man's force. Even where the elements *are the principal* cause of motion, still there must be animal force to put the machinery into such a state, as that the elements can act upon it. Subsequent to *Chamberlayne* and *Newte*, other cases occurred, in which some of the Judges considered the principles of that case to be confined to the particular sort of mill, as in *Dodson* and *Oliver*, in 1720 *, and *Chapman* and *Barlow* †, 1724; and it is possible, that there may be some history belonging to those cases, which we are not acquainted with.

The case of *Carleton* and *Brightwell* ‡, which happened in 1728, has great weight with me. It was decided on the authority of Sir *Joseph Jekyll*, a most eminent person, and is a decision of the Court of Chancery. But the dictum of Lord *Hardwicke* §, "that fulling-mills can only pay a *personal* "tithe, because it is only in the nature of *a trade*; "but where there are *corn mills*, each is to pay a *tenth* "*dish*,"—is embarrassing, if accurately reported. Lord *Hardwicke* was not only eminent as a general lawyer, but as a tithe lawyer. Very few unconsidered dicta, upon any subject, fell from that person, and he must have known the principle of decision

* *Bunb.* Rep. 73.

† *Bunb.* Rep. 184.

‡ 2 *Peere Will.* 462.

§ *Talbot* v. *May*, 1743. 3 *Atkins*, 17.

in

in *Chamberlayne* and *Newte*. It certainly increases the perplexity of this matter very much. *Thomas* and *Price**, which was decided in the Court of Exchequer, in 1759, is in favour of tithing by the clear profit; and *Wilson* and *Mason*, in 1770.† In the last case, there is much learning applied to the subject of mills. There has been a difference of opinion amongst the Judges, whether the tithe of a corn mill is prædial or personal. In *Gaches* and *Haynes*‡, and *Hall* and *Machet*§, the arguments of counsel, on both sides, admit it to be a personal tithe. In the latter case, the Chief Baron holds, it is prædial in respect to the person to whom payable, but personal as to the measure of payment, that is, by the clear profit.

Now, under such authorities, what is it proper for the Court to do? It would be a great satisfaction to me to have the matter set at rest, by a direct decision of that Court upon the point. But I shall, on the authorities which have been referred to, consider the tithe as personal. The subjects of this kingdom cannot, conveniently, be liable to two methods of tithing, creating different measures of obligation. The decisions of the Court of Exchequer, and of this Court, should be uniform on the same matter. I shall, therefore, direct the libel to be reformed, in respect to demanding the tenth toll-dish as the tithe of the corn mill.

* 3 *Gwill.* 871. † *Ib.* 974. ‡ *Ib.* 1256.
§ 3 *Anstruther*, p. 915.

BEAURAINE v. BEAURAINE.

25th *Nov.* 1808.

Appointment of the father of a minor, as *curator ad litem*, on election of the minor; but without the consent of the father, in order to substantiate proceedings against the son in a suit of cruelty and adultery, *not sustained.*

THIS was a question on the power of the Court to compel a father to appear as *curator ad litem* of his son, being a minor, who was cited to answer to his wife, in a suit of divorce, by reason of cruelty and adultery.

JUDGMENT.

Sir *William Scott.*—This is a proceeding for divorce against a minor; and it is laid down in our books of practice *, that a minor cannot appear in person, but must appear by his guardian or *curator ad litem*, lawfully assigned.

If a minor has no guardian or curator *ad litem*, and none can be assigned for the purpose of substantiating proceedings against him; it must amount to a total denial of justice towards the other party, who complains of his conduct, and who is, in this case, his wife, complaining of brutal and barbarous treatment, and praying the protection of the Court to be given to her, by a sentence releasing her from the necessity of cohabitation. Though he has no guardian, he has a father who is his natural guardian by the law of the land, who can bring actions on his behalf for injuries done to him, and is bound to maintain his child,—who may bring in this Court suits, on his behalf, against the wife, of exactly the same nature with that which is now brought against his son. The minor

* *Oughton*, tit. 20.

has

BEAURAINE *v.* BEAURAINE.

25th *Nov.* 1808.

has elected him his curator *ad litem*, and the father has refused, upon repeated applications, to accept the office, though offered to be protected from any expence, that might be incurred in the discharge of a paternal duty corresponding to the paternal privileges he enjoys;—and the son alleges, that there is no other person who will accept the office. In this state of things, unless he can be assigned curator, this consequence must follow, that minority shall protect a man in the most outrageous treatment of his wife. His marriage, as a minor, does not take him out of his minority, nor out of the incapacities of suing, or being sued, that belong to that state of minority. I have a right to suppose this to be a case of extreme oppression, that cries loudly for relief; —and if this Court cannot appoint the natural guardian to be the curator *ad litem*, this most dreadful of all doctrines inevitably follows, that the unfortunate woman, who marries a minor, is doomed to continue under the most intolerable tyranny that can be exercised over a wife. Minority is to give total impunity. Other Courts exercise a power of nominating officers of their own, or other proper persons, to be guardians for this purpose. But this Court neither has nor claims such power, and unless it can compel the natural guardian to perform his personal duty, there is a complete defeasance of all remedial justice.

Under this necessity, and to prevent that failure, I shall hold the father to be curator *ad litem*, and enforce the process for that purpose. It may be a new case; because fathers have been willing to stand forward in aid of justice, and in vindication of their sons. But it appears to be a case, for which an urgent necessity calls upon the Court to provide,

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BEAURAINE v. BEAURAINE.

25th Nov. 1808.

in the best manner that It can; and, I trust, that I do not exceed the limits of my duty, when I adopt the course which I propose: But if it should appear otherwise, I trust it will be pointed out in what better mode this Court could, more regularly, as well as more effectually, have reached the justice of such a case.

The Court assigned the father accordingly to give an appearance, as guardian to his son, by the next Court day. The order not being complied with, on the 7th of *December* 1808, the Court, on the prayer of the wife, pronounced the father contumacious, and signed the schedule of excommunication.

From that sentence, an appeal was prosecuted to the Court of Arches, which *affirmed* that decree; and on 7th *December* 1809, another schedule of excommunication was porrected and signed, when the party was accordingly excommunicated. In the meantime application was made to the Court of Chancery for a writ of *assoiler* and *deliverance* to the Bishop, to absolve him. That writ was decreed on 12th *February* 1810*, and on 9th *April* the party was absolved. †

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* 16th *Ves.* Jun. 346.

† The use of excommunication was discontinued sub modo by statute 53 *G.* 3. *c.* 127. *Vid.* Appendix, No. 5, p. 25.

LAGDEN *v.* ROBINSON AND GREEN.

7th *Dec.* 1810.

Subtraction of tithes: Endowment of the vicarage, though not in simple and positive terms, held sufficient. Matters of deduction and account, &c.

THIS was a suit instituted by the Reverend *Henry Allen Lagden*, Vicar of *Ware*, with the vicarage of *Thundridge* annexed, in the county of *Hertford*, against *Jacob Symms Robinson* and *James Green*, Parishioners of the same, "for "having received and possessed, either by them- "selves or some other person or persons, all the "tithes, tenths, and ecclesiastical rights and emo- "luments of a certain mill for grinding corn; and "having subtracted, taken, and converted the "same to their own use, without compensation or "composition, during the several years 1801, "1802, 1803, 1804, 1805."

JUDGMENT.

Sir *William Scott.*—This is a suit brought by the Vicar of *Ware*, for tithes of a mill, against the defendant, as occupier of such mill in the parish of *Ware*. There is no doubt that modern mills are liable to the payment of tithes to some person, as there is no plea *de non decimando* in their favour; and the tithes must be due either to the Rector, or to the Vicar by endowment. The only question that can be raised is, to which they are to be paid; since to one or the other, by the general law of the country, they must unquestionably be due. It appears, that the tithe of this mill has not been claimed for a considerable time; it is doubtful, indeed, whether it was ever claimed; certainly not by the present Vicar. The Vicar has proved his induction; it is also necessary, that his endow-

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LAGDEN v. ROBINSON and GREEN.

7th Dec. 1810.

ment should be proved in some form; for that obligation always lies on the Vicar.

The original endowment is not exhibited; but an authenticated copy of an instrument is produced, which is equivalent to the endowment; but it is of rather difficult construction. I have, however, thought it my duty to examine the original, which is of great antiquity, of the date of 1231. The instrument recites, in the first part of it, some contested claims and disputes which existed between the Prior of *Ware* and the Vicar, and which the then Bishop of *London*, and the then Dean of *St. Paul's*, are empowered, by Pope *Gregory* the Ninth, to settle. By the commencement of the instrument, it would appear, that the Prior had exacted an annual pension of ten marks of silver from the Vicar, and also had seized the tithe of mills, and of several acres of arable land. The parties are called, and an award is made, by which the Vicar is relieved from the pension, and it is then directed, "that for the greater security "of the Vicar, and for the putting an end to dis"putes, if the Prior of *Ware*, or any of his suc"cessors, should demand or claim (which it is "hoped they will not) any right or title in the "aforesaid pension of ten marks, that thence"forwards the Vicar shall have the tithe of mills "of the whole vill of *Ware* and *Thundrych*."

How this arose, it may not be easy now to say; but on the face of it, it looks like a conditional grant; and the connecting reason of the agreement, which was perhaps dependant on the history of that time, may be lost. There follows another part, however, which contains an actual and positive conveyance of the tithe of mills, amongst

 other

other tithes, in the most full and unequivocal terms; that the Vicar, and all future Vicars, "shall have "the tithes of *mills*, merchandize," and a variety of other articles there enumerated. This affirms the conveyance to the Vicar without limitation.

LAGDEN *v.* ROBINSON and GREEN.

7th *Dec.* 1810.

In the entry of this composition in the original instrument, preserved in the registry of the Diocese of *London*, are these entries as marginal notes, applied to the different parts of the subject matter. "Remissio pensionum, penalis conditio, dotatio "Vicarii de *Ware*," which are clear illustrations of the meaning of the instrument. The title of the Vicar, therefore, appears to me to be sufficiently established. The remainder of the case is simply matter of account *, and relates only to the quantity of

* In this case, an allegation had been given in, pleading some matters of deduction on behalf of the defendant, when an objection was taken to the plea, on the ground that some articles, set forth in the allegation, were contradictory to admissions that had been made in the answers of the defendant.

JUDGMENT.—Sir *William Scott*.—This is a defensive allegation, in a suit for tithe demanded for several years past: on that account some indulgence is required, in consideration of the difficulty of making as exact a return in his answers, as might otherwise be expected to be given by the party himself, who now offers this allegation. There would be equity in that mode of reasoning, if the delay had not originated in similar conduct imputable to the defendant, and there is, I think, ground for that imputation. The defendant had stood for many years, and still stands now before the Court, asserting, that no profit whatever was made of the mill. If that was so, there would be no ground for imputing laches to the Clergyman, that he did not sooner agitate the question, as it could not be expected that he would sue for nothing. It has been said, that no demand was made before 1805. It is not probable that the mill should not produce some profit. Looking at the opposition now made, the Court cannot but suppose that it was owing to some intimation of the same sort, that there had been so long a forbearance of the former demand. It is true, that causes of this description are usually determined on the libel and the answers of the parties, as

14th *Feb.* 1809.

Lagden v. Robinson and Green.

7th Dec. 1810.

of corn, ground at the mill during this period of years, and the tithe that is stated to be due: certain deductions are claimed, but on which there is now no dispute.

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as the demands are usually for tithes of small value, and it is desirable to discourage expensive proceedings as to the proof. If the party had stood on his answers, they would have been decisive, but he has not so done. An allegation is offered, and the Court is certainly disposed to hold, that any variation from the answers is not admissible, unless some very satisfactory reason can be given for it, that may convince the Court that the matter had escaped the recollection of the party, and for reasonable cause. In the present case, which must necessarily depend on a recurrence to several years past, there may be reason for the indulgence which is prayed. But the Court will exercise it, keeping, at the same time, strict watch on the other parts of the proceedings, that they may not run into more length and expence than is necessary.

As to the causes assigned why in a mill, consisting of six pair of stones, four only are worked, they are unnecessary to be pleaded, and may lead to an oppressive quantity of evidence; and the fact that a larger capital would be required than is employed, on account of the decline of the mealing business, is, as far as regards the quantum of capital, a fact entirely within their own knowledge. If the fact appears, that no more than four pair are worked, the Court will readily presume, that it is done for a good cause, and that they use as many as they conveniently can. That article, therefore, must be amended under these observations. The second article, which relates to the quantity of corn ground at the mill, during the several periods for which tithe is claimed, is not objected to. The third article states, that they have other occupations, as mealmen and farmers, and have not kept the accounts separate; so that it is impracticable for them to state the exact account of each. This is inadmissible in its present form. The parties must produce as exact an account as they can; if there is any difficulty, it is occasioned by themselves, and it is not sufficient for them to plead, that they mix their different occupations together, so as to make it impossible to account. The next article relates to hired storehouses. This expence may be charged, as common to all mills; since, I presume, it belongs necessarily to the trade to keep the grain of different parties distinct. I may be inclined to allow something for these sheds and barns, if they can shew that they

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The only question on which it is further necessary that the Court should give any opinion, is the matter of costs. These are subject to the discretion

LAGDEN v. ROBINSON and GREEN.

7th *Dec.* 1810.

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were obliged to hire them; though I observe, that no amount of expence is stated in the article. The next article pleads expences of shops at *Hertford*, though the precise deduction is not stated. I will not reject this article in the present stage. The next relates to oil, coals, fuel, and other minor expences, which are not necessary to be pleaded, as every body must know, that the mill cannot go on without them. Another article states, that from the ancient structure of the mill, more men are necessary to be employed. This history is not material, as the Court will give the parties credit for not employing more men than are really wanted; the Court will presume, that they are men of prudent conduct in their trade. The 9th and 10th articles plead the books of accounts, which will be very burdensome to the other party in taking a copy. It is usual to exhibit a schedule of the articles charged, which must be done in the present case; and I reject the books.

The next pleads that the mill is old; that it was built in 1723, and is in want of continual repairs; and that £700 had been expended upon them. In proof of this averment, an account is produced, which amounts to £500. I should not limit the party to the exact sum mentioned in the answers, but give them the benefit of the expenditure for so much as may be satisfactorily proved. The 13th article pleads parochial rates, and highway rates; that as to the highway rate, the service has been done by composition paid; it is described as a personal service, and that payment is made only by those who have not horses and carts to do the required work. I will not decide on this point at present, though I am not clear, that such an item might not be ground of objection and deduction. I will, however, intimate an opinion, that if the rate is merely a personal service, it is not to be allowed. The window tax and house tax are not connected with the profits of the mill necessarily, as pleaded; they seem to refer to the dwelling-house which the parties must have, and the terms are to be taken in their usual acceptation. If this deduction is insisted on, the article should be reformed, to the effect of alleging, that the tax is paid for the mill. There is, lastly, a charge, that if the parties kept a foreman, they should pay him £100 per annum, but that they do the business themselves. Other millers may choose to keep a foreman, but the necessity of determining upon a deduction of that kind, does not exist here, as it is not an actual disbursement, the parties here doing their own work. Under these observations, I admit this allegation.

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LAGDEN v. ROBINSON and GREEN.

7th Dec. 1810.

of the Court, to be exercised on the nature of the suit, and the conduct of the parties in it. The general rule is, that such a party is entitled to costs, unless they are forfeited by his misconduct. At the same time, there are other circumstances which are fit to be taken into consideration, which might render it a matter of peculiar delicacy, in the present case, to make any tender. Tithes had not been demanded, as it is presumed, within the memory of man; they certainly had not been by the present Vicar, which led, almost unavoidably, to the suit. Secondly, there is the obscurity in the endowment, which must have contributed to the determination of the party to take the judgment of the Court. These circumstances would render the ordinary obligation of making a tender peculiarly difficult; and though the Court is of opinion, that the Vicar on the whole is entitled to the tithes, It throws out these observations, wishing that the parties would come to some amicable agreement under the advice of counsel. If that cannot be effected, I must give my opinion absolutely on this point. It will, however, be very satisfactory to the Court, if this recommendation should be adopted.

On 14th *December* the Court gave costs generally; but directed them to be taxed moderately, taking off the expences of the defendant on the examination of witnesses on the last allegation.

APPENDIX.

APPENDIX.

No. 1.

The PETITION of the JEWS, for the repealing of the Act of Parliament for their Banishment out of England, presented to His Excellency, and the General *Council of Officers*, on Friday, Jan. 5th, 1648.

A. D. 1648.

To the Right Honourable Thomas Lord Fairfax, His Excellency, England's General, and the Honourable Council of Warre, convened for God's Glory, Israel's Freedom, Peace, and Safety,

The humble Petition of Johanna Cartwright, Widow, and Ebenezer Cartwright, her Son, free-born of England, and now Inhabitants of the City of Amsterdam,

Humbly sheweth,

THAT your Petitioners, being conversant in that city with and amongst some of Israel's race, called Jews, and growing sensible of their heavy outcryes and clamours against the intolcrable cruelty of this our English nation, exercised against them by that (and other) inhumane exceeding great massacre of them, in the reign of Richard the Second, King of this land, and their banishment ever since, with the penalty of death to be inflicted upon any if they return into this land; that by discourse with them, and serious perusal of their Prophets, both they and we find, that the time of the recall draweth nigh; whereby they together with us shall come to know the Emanuel, the Lord of life, light, and glory, even as we are now known of him; and that this nation of England, with the inhabitants of the Netherlands, shall be the first and readiest to transport Israel's sons and daughters, in their ships, to the land promised to their forefathers, Abraham, Israel, and Jacob, for an everlasting inheritance.

For the glorious manifestation whereof, and pyous means thereunto, your Petitioners humbly pray, that the inhumane cruel statute

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tute of banishment, made against them, may be repealed, and they, under the Christian banner of charity and brotherly love, may again be received and permitted to trade and dwell amongst you in this land, as now they do in the Netherlands. By which act of mercy, your Petitioners are assured of, the wrath of God will be much appeased towards you for their innocent bloodshed; and they thereby daily enlightened in the saving knowledge of him, for whom they look daily, and expect, as their King of Eternal Glory, and both their and our Lord God of Salvation (Christ Jesus). For the glorious accomplishing whereof, your Petitioners do and shall ever address themselves to the true peace, and pray, &c.

This petition was presented to the General Council of the Officers of the Army, under the command of his Excellency Thomas Lord Fairfax, at Whitehall, on January 5th, and favourably received, with a promise to take it into speedy consideration, when the present more public affairs are dispatched —Collection of Pamphlets, Bri. Mus. No. 403. art. 17.

No. 2.

At the Court at Whitehall, 11th February 1673.

Present, the King's most Excellent Majesty in Council.

UPON the petition of Abraham Delivera, Jacob Franco Mendez, Abraham de Porto, and Domingo Francia, on behalf of themselves and others, the Jews trading in and about the city of London, setting forth, that, in the year 1664, upon their humble petition, his Majesty was pleased to declare, that they might promise themselves the effects of the same favour as formerly they had, so long as they demean themselves peaceably and quietly, and without scandal to the government; that although the Petitioners have so behaved themselves ever since, yet they were last quarter sessions indicted of a riot at Guildhall, for meeting together for the exercise of their religion in Dukes Place; and the bill was found against them by the Grand Jury. And praying his Majesty would be pleased to permit them, during their stay here, to reap the fruits of his accustomed clemency, or give them a convenient time to withdraw their persons and estates into parts beyond the seas. His Majesty in council taking this matter into consideration,

ation, was this day pleased to order, and it is hereby ordered, that Mr, Attorney General do stop all proceedings at law against the Petitioners, who have been indicted as aforesaid, and do provide they may receive no further trouble in this behalf.

At the Court of Whitehall, 13th November 1685.

Present, the King's most Excellent Majesty in Council.

UPON reading this day at the board the petition of Joseph Henriques, Abraham Delivera, and Aaron Pacheco, overseers of the Jewish synagogue, and the rest of the Jewish nation, setting forth, that his late Majesty, of blessed memory, having found the Petitioners and their nation ever faithful to the government, and ready to serve him on all occasions, was pleased, in February 1673, to signify his royal pleasure, that whilst they continued quiet, true, and faithful to the government, they should enjoy the liberty and profession of their religion, which they accordingly peaceably exercised till Michaelmas Term last; that several writs out of the King's Bench, on the statute made in the 23d year of Queen Elizabeth, had been taken out against forty-eight of the Jewish nation, by one Thomas Beaumont, and thirty-seven of them arrested thereupon, as they were following their occasions on the Royal Exchange, to the great prejudice of their reputation both here and abroad; and therefore praying his Majesty to permit and suffer them, as *heretofore*, to have the benefit of the free exercise of their religion, during their good behaviour towards his Majesty's government. His Majesty, having taken this matter into his royal consideration, was pleased to order, and it is hereby accordingly ordered, that his Majesty's Attorney General do stop all the said proceedings at law against the Petitioners; his Majesty's intention being, that they should not be troubled upon this account, but quietly enjoy the free exercise of their religion, whilst they behave themselves dutifully and obediently to his government.

W. Bridgeman.

No. 3.

The following Extracts are taken from the Horæ Biblicæ, Butler's Works, vol. i. c. 1. s. 3.

" NOTWITHSTANDING the destruction of the city of Jeru-" salem, a large portion of the Jews remained, or established " themselves, in Judæa. By degrees they formed themselves into " a regular system of government, or rather subordination, con-" nected with the various bodies of Jews dispersed throughout the " world. They were divided into the Western and Eastern Jews. " The Western were those who inhabited Egypt, Judæa, Italy, " and other parts of the Roman Empire. The Eastern were " those that were settled in Babylon, Chaldæa, and Persia. The " head of the Western Jews was known by the name of *Patriarch;* " the head of the Eastern Jews was called '*Prince of the Captivity.*'

" The office of Patriarch was abolished by the imperial laws " about the year 429, from which time the Western Jews were " solely under the rule of the chiefs of their synagogues, whom " they called Primates.

" The Princes of the Captivity had a longer and a more splen-" did sway. They resided at Babylon or Bagdad, and exercised " their authority over all the Jews who were established there or " in the adjacent country, or in Assyria, Chaldæa, or Parthia. " They subsisted as late as the twelfth century.

" In the midst of their depression and calamities, the Jews " were attentive, in some measure, to their religion and language. " With the permission of the Romans, they established academies ; " The most famous were those of Jabnè, and Tiberias. About " the reign of Antoninus Pius, Rabbi Jehuda Hakkadosch pub-" lished a collection of Jewish traditions, called the Misna, the " style of which seems to shew, that their attempts to restore " their language had not been unsuccessful. A Latin translation " of it was published by Surenhusius, at Amsterdam, 1698—1713, " in six parts, or volumes, folio. As a supplement to this, the " first Gemara was written, for the use of the Jews of Judæa, " whence it is called ' the Gemara of Jerusalem.' The style of " it is so abrupt and barbarous, that the most profound Hebraists " almost confess their inability to understand it. After the death " of Antoninus Pius, a fresh persecution broke against them, " and they were expelled from their academies within the Roman " Empire. The chief part of them fled to Babylon, and the

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" neighbouring countries, and there, about the fifth century, " published what is called the second or Babylonish Gemara, ex- " ceeding the former in barbarism and obscurity. A translation " of it was begun in Germany, by Rabe. The Misna, and the " two Gemaras, formed what is called the Talmud; and the idiom " of this collection is called the Talmudical. It is used by many " of their writers. About the year 1038, the Jews were expelled " from Babylon.

" Some of the most learned of them passed into Africa, and " thence into Spain. Great bodies of them settled in that king- " dom. They assisted the Saracens in their conquest of it. " Upon that event, an intimate connexion took place between the " disciples of Moses and the disciples of Mahomet. It was ce- " mented by their common hatred of the Christians, and subsisted " till their common expulsion.

" This is one of the most brilliant epochs of Jewish literature, " from the time of the destruction of Jerusalem. Even in the " darkest ages of their history, they cultivated their language with " assiduity, and were never without skilful grammarians, or subtle " interpreters of Holy Writ. But with respect to the period we " are speaking of, it was only during their union with the Sara- " cens, and under the Caliphs of Bagdad, that they ventured into " general literature, or used, in their writings, a foreign, and " consequently, in their conceptions, a profane language."

VII. 4. The religious tenets of the Jews are *thirteen* in number; amongst which are, viz.:

" 8th. I believe, with a perfect faith, that all the law, which at " this day is found in our hands, was delivered by God himself to " our master Moses. (God's peace be with him.)

" 9th. I believe, with a perfect faith, that the same law is never " to be changed, nor any other to be given us of God, (whose " name be blessed.)

" 10th. I believe, with a perfect faith, that God (whose name " be blessed), understandeth all the works and thoughts of men; " as it is written in the prophets, He fashioneth their hearts alike; " He understandeth all their works.

" 11th. I believe, with a perfect faith, that God will recom- " pense good to them who keep his commandments, and will " punish them that transgress them.

" 12th. I believe, with a perfect faith, that the Messiah is yet " to come; and although he retard his coming, yet I will wait " for him till he come.

" 13th. I believe, with a perfect faith, that the dead shall be " restored to life, when it shall seem fit unto God the Creator, " (whose name be blessed, and memory celebrated, world without " end. Amen.)"

VII. 5. The doctors and teachers of the Jews have been distinguished by different appellations.

Those employed in the Talmud were, from the high authority of their works, among the Jews, called Aemouroïm, or Dictators. They were succeeded by the Seburoim, or Opinionists, a name given them from the respect which the Jews had for their opinions, and because they did not dictate doctrines, but inferred opinions by disputation and probable arguments. These were succeeded by the Gheonim, or the Excellent, who received their name from the very high esteem, and even veneration, in which they are held by the Jews. They subsisted till the destruction of the academics of the Jews in Babylon by the Saracens, about the year 1038. From that time the learned among the Jews have been called Rabbins, or the Masters.

It is seldom, that a Jew applies himself to profane literature. Even the lawfulness of it has been generally questioned. Some have greater respect than others for the Talmudical doctrines. In consequence of using in his writings some free expressions concerning them, a violent storm was raised against Maimonides. Kimchi, and, generally speaking, all the Spanish and Narbonnese doctors took part with him; the others, led on by R. Solomon, the chief of the synagogue of Montpellier, opposed him — both parties were equally violent, and the synagogues excommunicated each other. This dispute commenced about the middle of the twelfth, and lasted till nearly the thirteenth century. But the great distinction of the Jewish Rabbins is that of the *Tanaits* or *Rabbanists*, and *Caraites*. The first are warm advocates for the traditionary opinions, generally received among the Jews, particularly those of the Talmud, and for the observation of several of the religious ceremonies and duties, not enjoined by the law of Moses: the others absolutely reject all traditionary opinions, and hold all rites and duties not enjoined by the law of Moses, to be human institutions, with which there is no obligation that a Jew should comply.

No. 4.

LINDO v. BELISARIO.—Vid. suprà, p. 216.

Judgment in the Court of Arches.

SIR William Wynne.—This is a suit of jactitation brought originally in the Consistory Court by Miss Lindo, a minor, or rather by her guardian, against Mr. Mendes Belisario. 21st Nov. 1796.

The cause commenced by a citation which bears date the 28th of November 1793,—a libel was admitted, without opposition, pleading the jactitation. An allegation, justifying the jactitation, was admitted on the part of Mr. Belisario, and an allegation in reply, on the part of the minor, was given in. Upon these pleas, and the evidence taken upon them, the cause was heard in the Consistory Court of London, on the 4th August 1795; when the Judge of that Court, by his interlocutory decree, pronounced that Aaron Mendes Belisario had failed in the proof of his allegation, and that the said Esther Lindo, spinster, was not his wife. From that sentence the present appeal is brought.

A very singular case it most undoubtedly is, in which an Ecclesiastical Court is called upon to pronounce, and has pronounced, upon the validity of a marriage between a Jew and Jewess, celebrated according to the rights of the Jewish religion. The only instance within my memory, which goes a very considerable way back, in which a Jewish marriage was at all put in issue in any Ecclesiastical Court, was that which came before the Prerogative Court in the year 1794, in the case of *Vigevena and Silveira against Alvarez* *. That was an interest cause. It was a question,

* On admission of a libel, pleading " a marriage between Jews, according to the " rites and ceremonies of the Jewish religion," Dr. Harris and Dr. Laurence objected, That persons coming before the Ecclesiastical Court to claim any right by marriage, under that jurisdiction, must shew the marriage to have been agreeably to the rites and ceremonies of the Church Christian. That it was so decided in Haydon v. Gould, Prerog. and affirmed in the Delegates, 1 Salk. p. 119. That there had been another case also, Hutchinson v. Brooksbank, Levinz, 376. of a person sued for fornication, where there had been a marriage in a conventicle, and in which there was a motion for prohibition, on which the court of common law never finally determined. That the same principle held as to Jewish marriages, and there was a clause in st. 6 & 7 Will. & Mary, ch. 6. s. 5, 7, and 8. respecting Quakers, Papists, Jews, or any other persons who shall cohabit and live together as man and wife, and be thereby liable to pay the several and respective duties payable on marriages, &c. " That nothing herein contained shall be construed to make good or " effectual in law any such marriage or pretended marriage, but they shall be of " the same force and virtue, and no other, as they would have been if this act had " never been made." That it might have been sufficient perhaps to have pleaded " the

LINDO v. BELISARIO.

tion, who should be entitled to the property of the party deceased? The person, who appeared before that Court, urged himself to be the legitimate son of the person whose property was disputed, which was disputed by others: — though the circumstances of that marriage were pleaded, yet it came to no sentence, because the parties agreed. No Jewish marriage has come before this Court at all, except that. I was not aware of the instance, which Dr. Swabey has mentioned to-day, of Andreas

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the owning and acknowledgment of the parties, and the marriage might then have been taken on the ground of presumption or repute, but that if the actual marriage was pleaded, it must be such a marriage as was agreeable to the rites of the church of England.

In support of the allegation, Sir William Scott and Dr. Nicholl submitted, that this was the first time that the principle had been maintained, that Jews cannot celebrate marriages otherwise than according to the rites of the Christian church. The peculiar and fundamental tenets of their religion were adverse to their use of the rites of the Christian church, and distinguished their case materially from Dissenters, who acknowledged the same fundamental doctrines, and did, occasionally, frequent the service of the church. As to Quakers, the question had never been formally decided. But as to Jews, it was unreasonable to maintain, that their marriages according to their own rites should not be valid. They had existed always as a separate community, and in some respects on the footing of aliens, and were entitled to have their marriages tried by their own law. Acts of parliament had recognized this principle in declaring that the marriage act should not extend to Jews. If no Jewish marriage could be good, in all cases of intestacy the Crown would succeed to the effects, which had never been maintained; that the very silence on this point was a recognition of the validity of such marriage; and as to the distinction that you might plead the acknowledgment, but not the fact of marriage, it was one which the Court would not sustain.

Court. — Sir William Wynne. — The objection taken is, as far as I know, perfectly novel. I do not recollect any case which I can name, in which a Jewish marriage has been pleaded; and I take it there has been no case, in which a Jew has been called upon to prove his marriage. If there had, I conceive that the *mode of proof* must have been conformable to the Jewish rites; particularly since the marriage act, which lays down the law of this country as to marriages by banns or licence, for all marriages had according to the rites of the Church of England, and with an exception for *Jews and Quakers:* That is a strong recognition of the validity of such marriages. As to Dissenters, there is no such exception, and no one would trust to the rules of their particular dissenting congregations, for the validity of marriage. The comparison, therefore, between the Jews and Dissenters does not hold, and more particularly in this, that the Jews are *Antichristian,* the Dissenters *Christian.* Dissenters marry, and Papists marry, in the church of England. In Haydon v. Gould the marriage was according to their own invention, and the Prerogative Court refused to acknowledge that marriage. Here the parties are alleged to have been married "according to the rites of the Jewish church." And I am of opinion, that this allegation is very proper to be admitted.

v. Andreas,

v. Andreas, which passed in 1737; where, as I understand the statement, there was a suit for the restitution of conjugal rights brought by a Jewess against her husband, and the libel was opposed upon the ground, that a Jewish marriage was not a matter for the jurisdiction of the Ecclesiastical Court. In that case the plea was admitted, but it does not appear to have gone any further.* The validity of the marriage, therefore, might not have come in issue at all in that case; because the person who brought the suit, insisted that there had been a Jewish marriage, and pleaded the fact, that the plaintiff was the wife of such a person. So far as it went, therefore, the Court was not to inquire whether it was a valid marriage, or not; but taking the fact to be, as you always do, upon the admission of a plea, that she was the lawful wife, she desired she might have the aid of this Court, calling upon her husband to restore her conjugal rights. The Ecclesiastical Court was the only one they could apply to.

* Consist. 4 sess. Nov. 24, 1737, before Dr. Henchman. Andreas and his Wife were both Jews, and were married according to the forms of the Jewish nation: she cited him to answer to her in a cause of restitution of conjugal rights. On *admission* of the *libel*, Dr. Strahan objected, that, as they had been married according to the forms of the Jewish nation, and not of the Church of England, the Court could take no notice of such marriage, and she could not institute such a cause against her husband in the Ecclesiastical Court. *And the case of Green v. Green was cited, where a Quaker instituted such a suit, and the libel was dismissed,* because they were not married according to the forms of the Church of England.—The Court was of opinion, however, that as the parties had contracted such a marriage, as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel.—In 1661 a marriage between Quakers, according to their own ceremonies, was held valid at the assizes at Nottingham, in a cause of ejectment. p. 492. Sewel's Hist. of Quakers.—In the case of Harford v. Morris, Mr. Justice Willes said, that he remembered a case many years ago upon the Circuit, where a Quaker brought an action of Crim. Con. in which it was necessary to prove the marriage. The objection was taken, that he was not married according to the rites of the Church of England, and the point was argued; but it was overruled; and the plaintiff recovered thereon. In Dodgson v. Haswell, Deleg. 1730. There was suit between two Quakers, in which the libel pleaded a marriage had, in the manner usually observed by those of their religion, by the public declaration thereof at their monthly meetings in the form pleaded, and that notwithstanding the Defendant had refused to solemnize and consummate. The defendant admitted the contract, but alleged that it was conditional. There had been two sentences against the defendant in the Consistory of Durham, and afterwards at York. It does not appear what was the result of the proceedings in the Delegates.

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LINDO v. BELISARIO.

The Jews are entitled to civil rights of every kind, and particularly those of marriage; and therefore there must be a Court that shall carry those rights into effect, as well as the rights to property. It does not appear to me, that the validity of the marriage would have come in question at all, so far as the pleas went.

The case of Green v. Green * was a case of a Quaker woman bringing a suit of restitution against her husband. The same objection was taken, that they were not persons married in such a way as this Court would recognize. I do not at present remember whether that suit ever came to a sentence.

This is the first cause, therefore, where the validity of a Jewish marriage has been put distinctly in issue in an Ecclesiastical Court. That being the case, it is very material for me to consider how the matter comes before the Court, and with what view, especially when it comes directed by the high authority which has sent it to these Courts. It appears, by instruments which are annexed to each of the allegations given in, that the proceedings in the Consistory Court were commenced, in pursuance of an order made by the Lord Chancellor, that Abraham De Mattos Mocatta should institute a suit in the Consistory Court of the Bishop of London, in behalf of Esther Lindo, to whom he is guardian, to try the validity of the marriage said to have taken place, between her and Aaron Mendes Belisario. It is further pleaded, that this order was obtained by the petition of the Executors of the wills of the Father and Mother of the said Esther, and the Trustees of a sum of money under her father's will, amounting to about £4,000; that, by the will of her Mother, the interest of certain monies is to be applied to her use, until she attained the age of twenty-one, or day of her marriage, provided she married with the consent of the major part of her Mother's Executors; but in case she married without such consent, then the money was to go to her issue, and in default of such issue, to be divided among the other daughters of the Executrix. It has been further stated to the Court, that Aaron Mendes Belisario was a person in low circumstances, and that it was a very improvident match, but that he insisted she was, in point of fact, his wife, and was married to him on the 26th July 1793, and threatened to institute proceedings at law to get possession of her person and property.

Under those circumstances, it became necessary, before the Court of Chancery could stir in this business so as to make any

* Vide note, supra, p. 9.

order,

order, to know whether there had been a marriage, and whether the young woman, by whose guardian this suit was instituted, was a wife or not. That is the question to be determined; and it was of consequence, because it further would arise, supposing she had married without the consent of the executors, whether she was legally married or not? In order to determine this, it was referred, by the Lord Chancellor, to the Consistory Court of London, where the parties were domiciled. The reference must, undoubtedly, have been made upon the analogy of courts, the Court knowing, unquestionably, that, by the law and constitution of this country, the Ecclesiastical Court is the only Court which has cognizance of marriages; but it was without considering more particularly what the persuasion or religion of the parties was. It is sent to the Ecclesiastical Court, which is the ordinary jurisdiction with regard to marriages, but decides upon very different rules and grounds than those upon which this must be considered. In marriages between Christians, the Court is in possession of the law which it is to administer, and must be supposed to be conversant in that law; but that is not the case with respect to the law of the Jews. The Court Christian, as it is called, has no power upon that law but by analogy. It came to the Consistory Court, and the Judge, seeing in what manner it was brought, took certain rules for his guide, I think very properly, and I shall do the same. The rule of decision must necessarily be different with respect to this marriage, from that which it would be between Christians. I must attend to the ground upon which it was determined, and the reason of it being sent from the Court of Chancery, which was to know, whether the ceremony, which took place, constituted a good marriage? Perhaps it may be said, that it might be as well tried by a Jury as by the Ecclesiastical Court; but as it comes directed by the High Court of Chancery, I must inquire as well as I can, obtain the best information I can, and make such a return to that Court, as to the best of my judgment is right, either that the party is the wife, or is not the wife of Mr. Belisario: — from thence concluding, that he will be entitled to her fortune, as is directed by the will of her mother, supposing her to be the wife, and that he will not be entitled either to her person or property, supposing her not to be. That is the question I am to try, whether she is the wife of Mr. Belisario, who is the party in this cause; and if I find that he is not entitled to the rights of a husband over the person and over the property of this lady,

LINDO v. BELISARIO.

as his wife, that must be the answer which this Court is bound to return. What then is the evidence respecting that fact, and the effect that fact would have among persons of the Jewish religion, and persons best able to tell what the Jewish laws are?

It is proved, by the witnesses examined upon Mr. Belisario's allegation, that the sister of Esther Lindo was married to the brother of Aaron Mendes Belisario; that the parties in this cause often met at Jacob's house, and that an intimacy was soon contracted between them; Esther Lindo being at that time a girl of the age of sixteen, and Mr. Belisario of the age of twenty-six or twenty-seven. The two witnesses, who depose to the fact of marriage upon which Mr. Belisario rests his case, as to its being a valid marriage, are Lyon Cohen, who is described as a tailor, and Abraham Jacobs, residing in the parish of St. Mary, Whitechapel. He says, to the 6th article, "that he knows and is intimately acquainted with the "articulate Aaron Mendes Belisario, party in this cause, who is a "Jew of the Portuguese nation, and the Deponent also knows the "articulate Esther Mendes Belisario, formerly Lindo, acting by "Abraham de Mattos Moccatta, her guardian, the other party, who "is a Jewess of the same nation." To the 14th interrogatory, he says, "that being intimate with the said articulate Aaron Mendes "Belisario, he asked the Deponent, about three or four days "before the marriage hereinafter mentioned, to attend and be a "witness to his marriage; that the Deponent consented thereto; "and the Friday following being appointed for such marriage, "which was the 26th day of July, he also desired the Deponent "to ask a friend of his to be the other witness thereto, the "ceremony of such a marriage among the Jews requiring two "witnesses, who must also be Jews; that the Deponent accord-"ingly, on the Thursday the 25th of the said month of July, "asked his fellow-witness, Abraham Jacobs, with whom the "Deponent was intimate, to go with the Deponent on the next "morning to the house of the said Jacob Mendes Belisario in "Little Bennet Street aforesaid, where it was agreed that all the "parties were to meet, and the said ceremony was to be per-"formed; and the said Abraham Jacobs having consented "thereto, on the next morning, being Friday the 26th day of July, "accompanied the Deponent to the said Jacob Mendes Belisario's "house about nine o'clock in the morning, where they met the "said Aaron Mendes Belisario, and breakfasted with him; that "the said Jacob Mendes Belisario and his wife were out of

" town ; and after that they, the Deponent and the said Abraham " Jacobs, had been about two hours or two hours and an half " at the house of the said Jacob Mendes Belisario, the articulate " Esther Mendes Belisario, then Lindo, came to the said house, " and went up stairs into a room on the first floor, accompanied " by the said Aaron Mendes Belisario, who, a short time after- " wards, came down into the room where the Deponent and the " said Abraham Jacobs were waiting, and desired them to walk " up stairs ; that they accordingly went with him into the room, " where the said Esther Lindo then was, and they were then " introduced by him to her ; and after a little ceremony between " all the parties, the said Aaron Mendes Belisario, intending to " proceed with his marriage, did, in the presence of the De- " ponent and the said Abraham Jacobs, who are respectively " Jews, say to the said Esther Mendes Belisario, then Lindo, at " the same time holding a ring to her, " Do you know that, by " taking this ring, you become my wife ?" to which she answered, " she did ; that the said Aaron Mendes Belisario then said to " her, " Do you take it with your free will and consent ?" to which " she answered, " I do ;" or they then expressed themselves in " words to that effect ; and thereupon the said Aaron Mendes " Belisario placed the said ring on one of her fingers on her left- " hand, but which of her fingers the Deponent does not re- " collect," nor is it material to the validity of such marriage, which she tendered and held out for that purpose, " and freely and " voluntarily accepted and received the said ring, and, at the " same time that the said Aaron Mendes Belisario put the " said ring on the said Esther Lindo's finger, he repeated the " Hebrew words," the translation of which we have in another place, " and after such ceremony had taken place, they, the said " Esther Mendes Belisario and the said Aaron Mendes Belisario, " went out of the room, and the Deponent and the said Abraham " Jacobs remained there, until the said Esther Mendes Belisario " went away, which was soon after, and then they, accompanied " by the said Aaron Mendes Belisario, went out of the house " together." And he further saith, " that he looks upon and " believes the said marriage, as between persons professing the " Jewish religion, to be a good and valid marriage ; and the " Deponent knows of several marriages under similar circum- " stances, which are held and reputed to be good and valid." This is confirmed, I think, exactly as to all circumstances that are stated by Abraham Jacobs, the other witness. Of the other wit-

LINDO *v.* BELISARIO.

witnesses examined upon Belisario's allegation, some speak to the acquaintance and connexion there is between the parties, respecting which there is no doubt at all; and the other, as to the effect which such a ceremony, which is proved to have passed between them, has by the Jewish laws, and whether it is, by that law, to be considered as a marriage or not.

The first of the witnesses examined is Mr. *D'Azevedo*: he says, "he is reader to the Portuguese Jews synagogue in the city of "London, and is well acquainted with the rites and ceremonies "of marriage in the Jews' religion, as handed down by his "ancestors. That having read the Hebrew words written "in the said first article, which he fully and perfectly under-"stands, he cannot take upon himself to say, whether such "words, being repeated by a Jew, a bachelor of the age of "thirteen years or upwards, to a Jewess, a spinster of the age of "thirteen years or upwards, with an intent to contract matrimony, "and, at the same time, delivering to the said Jewess a gold ring, "in the presence of two credible witnesses, being also Jews, and "the said Jewess freely and voluntarily receiving and accepting "the said ring, does or does not make an effectual and valid mar-"riage; nor can he take upon himself to depose, whether or not "the same is held among the Jews, or persons professing the "Jews' religion, or universally deemed, reputed, and taken to be "a good and valid marriage, by the High Priest, Chief Rabbi, or "Archisynagogus, and the Rabbies or Priests, his colleagues, and "by persons acquainted with the rites and ceremonies of mar-"riages in the Jews' religion;" for the Deponent saith, "the "repeating the said words in the Hebrew language, and the de-"livery of the ring in the manner pleaded in the said article, forms "a part of the marriage ceremony among the Jews, and is called "the Kedushim, without which it is not a marriage in the Jews' "religion; but the Deponent cannot say whether or not such "ceremony of the Kedushim alone would constitute an effectual "marriage; but being incompetent to give an opinion thereon, "he saith, so far is he from being satisfied of the validity of such a "marriage, that, if he was to be married, he should most certainly "conform to the ceremony of a public marriage, lest the Kedu-"shim might be deemed insufficient to validate a marriage among "the Jews agreeably to their laws." This witness is the son of the late High Priest, and who was so a great many years, and it is allowed that he was certainly a man of great authority and experience. The witness is his son, and he is employed in the syna-

gogue,

gogue, and expresses himself very doubtful as to it making a complete marriage, and speaking himself of it as being rather a part of the marriage only, than any thing else.

The next witness, is the brother of the last. He describes himself to be a watchmaker, and he says, to the fourteenth article, "that " he is a total stranger to the facts pleaded therein; but saith, that " if the said facts are true, as therein pleaded; if there was no " compulsion used, and the articulate Esther Mendes Belisario, " formerly Lindo, received and accepted the ring from the said " Aaron Mendes Belisario freely and voluntarily, that such a " ceremony, as is pleaded in the said article to have passed be- " tween the parties in this cause, is binding on them, and is so " far good and valid, as between persons professing the Jewish " religion, that they could not, according to the rites and cere- " monies of the marriages in the Jews' religion, marry any " other person, without being first divorced from the aforesaid " marriage, which is called the Kedushim;" but the Deponent saith, " that such a marriage as aforesaid is not perfect or com- " plete, for want of the officiating Priest to pass the nuptial bene- " diction on the parties, and the same is liable to be called " for proof before the Bethdin, or tribunal before mentioned. " But if it should then appear that the parties, who had been so " married by the Kedushim, were so married without any com- " pulsion or deceit, and that the witnesses thereto were Jews, " such a marriage would, as the Deponent verily believes, be held " to be good and valid, as binding on the parties."

The third witness, who is called on the same side, is Solomon Mordecai Ish Yemene, who is described as one of the students of the college of the Portuguese Jews. He says, " that while he " lived at Hamburg, he filled the office of High Priest of the " Portuguese Jews for three years; that he is very well acquainted " with the rites and ceremonies of marriage. That if a Jew, being " a bachelor, and of the age of thirteen years and upwards, shall " seriously, and with an intent to contract matrimony, deliver, in " the presence of two credible witnesses, who are respectively " Jews, a gold ring, and repeat the words before stated, in the " Hebrew tongue, to a Jewess, a spinster, and of the age of thir- " teen years and upwards, and she shall freely and voluntarily " receive and accept the said ring, the same is held among the " Jews an effectual and valid marriage, conformable to the law " of Moses; and he saith, that it is so deemed, and univer- " sally reputed and taken to be by the said High Priest, Chief

" Rabbi,

LINDO *v.* BELISARIO.

"Rabbi, or Archisynagogus, and the Rabbies or Priests, his col-"leagues, and by all the Jews or persons acquainted with the rites "and ceremonies of marriage in the Jews' religion;" and he further saith, "that the before-written Hebrew words are of his, "the Deponent's, own hand-writing, and are the same as those "written in the first article of the said allegation, the translation "of which in English is, '*Behold, thou art sanctified unto "me with this ring, according to the law of Moses and Israel;*' "that such ceremony among the Jews is called the Kedushim; "that some Jews differ in the translation of the word used, "which is, according to one interpretation, 'prepared,' and, "according to another, 'sanctified;' but they all agree that such "a ceremony is held a good marriage, so much so, that Moses "himself could not invalidate it, according to the Mosaic "law; and further to the said article he cannot depose, save "that the Rabbies do require that the persons between whom "such afore-mentioned ceremony of the Kedushim shall have "passed, shall afterwards go through the ceremony of the Hupa "and the seven blessings, which, according to the rabbinical "ceremonies, is the usual way of marrying; but the omission of "such latter ceremony does not invalidate the marriage by the "Kedushim alone, for such persons are lawful husband and wife, "according to the law of Moses, which is the foundation of the "Jewish law, and by which the Jews are ruled in all matters of "religion."

The last witness examined on this head is Solomon Lyon, who describes himself to be a Rabbi of the German Jewish nation. He says, "that the aforesaid ceremony of the delivery and ac-"ceptance of a ring or a piece of money, and the repeating the "Hebrew words, which in English signify, '*Thou shalt be holy "to me with this ring, according to the law of Moses and Israel,*' "is, among the Jews, called the Kedushim, and was instituted "by Moses as a law of marriage among Jews; but that since "the Rabbies have appointed a further ceremony of marriage, "called Hupa and the seven blessings, in addition to the Kedu-"shim, the same is mostly observed at the time of marriage of a "Jew and Jewess, agreeably to the rabbinical laws, although the "omission of the Hupa and the seven blessings cannot invalidate "a marriage by Kedushim alone; for the Deponent saith, that "such last-mentioned marriage, notwithstanding such aforesaid "omission, would, according to the law of Moses and the Jewish "law, be held effectual and valid."

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To the fifth interrogatory, the same witness says, "that, according to the original Jewish law, which was given by Moses, "the only ceremony which constitutes marriage is that of the "Kedushim, but since that time the Rabbies have added the ceremony of Hupa, as necessary to a Jewish marriage; but even "Beth Joseph himself lays it down, that a marriage by Kedu-"shim alone cannot be invalidated, if there is no deception used." Annexed to this allegation given by Mr. Belisario, there is a certificate that was addressed, in the year 1778, by Moses Cohen D'Azevedo, and another Priest, to the Elders of the Portuguese nation, and to the High Priest, a man of very great learning in the Jewish law. The certificate is signed by the gentlemen, who, I suppose, were the Bethdin of the time. Now, it appears to me, that this was a very different case from that which is now before the Court. That appears to have been a much more solemn act than this. It is called a contract; and it appears that it was signed by the parties, and signed by two witnesses who were present: therefore there was much more solemnity in that act, than is proved to have passed in the present case; but that which, in my apprehension, completely distinguishes it, is, that the reference made to them was, whether the marriage between those two persons was valid, and whether the children born were legitimate? They give it as their opinion that it was valid; that the woman could not marry without a divorce; that they were cohabiting in venial sin, and that the children were legitimate; the fact being, that those parties were cohabiting, and had children —That had accordingly, to all intents and purposes, the effect of the Hupa; and the certificate is, that it was valid, although there had not been the Hupa, but that which supplies the place of it; for there had been a cohabitation: therefore, that is a case perfectly different from that now before the Court, where there appears to be no cohabitation or consummation, but the mere declaration of parties joined together, in the way which has been stated, amounting to a Kedushim, and nothing more; and it is not suggested that any other step had been taken, but that of the Kedushim.

The allegation, admitted on behalf of Esther Lindo, recites what is alleged on the part of Mr. Belisario, respecting the act taking place; but it pleads that it was not an effectual marriage, and upon that allegation there have been four witnesses examined.

The first is David Henriques Julian: who says, "that he is "one of the Rabbies of the Portuguese Jews Synagogue in the "city of London; that there is not a High Priest of that

LINDO *v.* BELISARIO.

" Synagogue; but that the deponent has for seven or eight years
" last past been one of the Rabbies who fill the office of High
" Priest, or Archisynagogus; and as such, hath ever since formed
" one of the tribunal called the Bethdin, which, among the Jews,
" is the highest authority in Ecclesiastical cases; and consists at
" present of two chief Rabbies, who are appointed by the Syna-
" gogue, and they call in a third Rabbi when they have any
" case to determine; that, at present, the deponent and Hasday
" Almosnino are the chief Rabbies so appointed by the said
" Portuguese Synagogue, of which this deponent is the first."

He says, " that if a Jew, being a bachelor of the age of thir-
" teen years and upwards, shall seriously, and with an intent to
" contract marriage, deliver, in the presence of two credible wit-
" nesses, who are Jews, a gold ring, and repeat the aforesaid
" Hebrew words to a Jewess, who being a spinster, and of the
" age of thirteen years and upwards, and she shall freely and
" voluntarily receive and accept the said ring, in the manner, as is
" stated in the recital, from the first article of the said allegation
" given in and admitted on the part and behalf of the said Aaron
" Mendes Belisario, the same would not be called a marriage
" amongst the Jews, but only a betrothment; the effect of which is,
" that she cannot, by the rites and ceremonies of the Jews, marry
" any other man than the person to whom she is so betrothed, unless
" she is freed from such betrothment by his giving her a divorce-
" ment, which he has power to do when he pleases; and the Jewess
" so betrothed by the Kedushim alone, is complete mistress of her
" own property, and may dispose thereof in whatever manner
" she pleases; and the Jew to whom she is so betrothed, is not
" obliged to maintain or provide for her, till she has gone through
" the full ceremony of marriage with the said Jew; and if she should
" die after being so betrothed, or having gone through the cere-
" mony of the Kedushim alone in manner as aforesaid, he, the said
" Jew, would have no right to any part of her property; neither
" would she, if the Jew was to die, be entitled to any dowry, or
" other part of his property: and he further saith, that the cere-
" mony essential to, and which constitutes an effectual, valid, and
" legal marriage among Jews, is, that a formal contract in the He-
" brew language must be entered into by the bridegroom, with the
" bride according to the rites and ceremonies of the Jews, and the
" rules of the Jewish congregation, to which the parties belong,
" which is drawn up by the Priest or Minister who marries them,
" and must be signed by the bridegroom and two witnesses before
" the ceremony of marriage, and must also be entered and registered

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LINDO v. BELISARIO.

" in a certain book kept for that purpose in the Synagogue, or by " the Priest or Minister of such congregation, and the said entry " must also be signed by the bridegroom and two witnesses; " after which the original contract is always delivered to the " bride or other relations; that by such contract the Jew binds " himself to maintain, cloath, honour, and behave with conjugal " duty towards the Jewess his wife." But the deponent saith, " that if a Jew and a Jewess, after having given and received the " Kedushim in manner as aforesaid, and such Jew was after- " wards to say, in the presence of two witnesses respectively " Jews, that he was going to have a connexion with such Jewess " in the name of marriage, and then retired and had carnal " knowledge of such Jewess, the deponent believes that, in such " case, it would be held a good and valid marriage between such " Jew and Jewess, according to the rites and ceremonies of the " Jews, and would be so pronounced to be by the Bethdin; but " the deponent does not remember any such case, and only states " the same as his opinion." He says, to the 11th Interrogatory, " that the children of a Jew and Jewess, who have been by their " parents declared to be their children, would, by the law of " Moses, inherit the property of their parents, as well as children " born under the most solemn form of marriage, if even the " Kedushim, or any form of marriage, had never passed between " their parents." And he further answers, " that, supposing a " Jewess, who had received a ring under the Kedushim, shall " carnally connect herself with any other man, than him who gave " her such ring, she would be considered an adulteress, according " to the Jewish law; and if a man, being a Jew, should commit " a rape on a Jewess who had so received a ring, he would, accord- " to the Jewish law, be punished with death; as would a Jew " who had committed a rape on his neighbour's wife."

Mr. Almosnino, the other Rabbi, deposes in the same manner, " that it would not constitute a valid marriage, but only a betroth- " ment; and the Jewess so betrothed remains mistress of her " own property, and may dispose of it in any way she pleases; " and that if such Jewess should die, after being so betrothed, " the Jew has no right to her property, or any part of it."

The third witness is Isaac Delgado, who fully confirms what the other two witnesses have said with respect to the betrothment; and Mr. Ish Yemene says, to the third Interrogatory, " that the " property of a Jewess is inheritable by her relations, and not by " the man; but that the husband is heir to the married woman." And to the fourth Interrogatory he says, " that the relations of a

"woman betrothed are, by the Jewish law, bound to pay the "burial expences; and by the like law, those of a married woman "are to be paid by the husband."

It was mentioned by the Counsel, that there were considerable contradictions in the evidence given by those witnesses.—I do not observe any that are material; they all say, "that the "Kedushim is such a betrothment, or such a contract entered "into between the parties, as cannot be dissolved without "a divorce; that the woman, if she should connect herself "with another man, would be an adulteress, and that so far it is "to be considered as a marriage:" but they say, "it has none of "the effects by which the property is conveyed; that a man has no "right to the property of the betrothed woman; that she may "do what she will with her property; and if she dies it will not "go to him, but to her relations."

Thus the evidence stood upon the first hearing; and then the Judge did, after hearing the argument, not without giving an opportunity for the Counsel to object, but for the purpose of information, direct that certain questions should be propounded by the Registrar to the Bethdin; and they, being delivered to the Bethdin, were likewise delivered to the Proctor for the adverse party; and he brought in answers given by two of the persons who were witnesses for his party; and before the Judge pronounced sentence, they were admitted by consent on both sides; both the answers of the Bethdin, and the two other persons also.

Respecting the questions put to them, the first is, "Whether "it is admitted that Beth Joseph, who is proved in this cause "to be one of the principal guides of the Jewish Portuguese "Church, has laid it down that the Kedushim alone cannot be "invalidated?" That means, as I understand it, whether, if that ceremony has passed, and no other, it will require a divorce to set the party at liberty? The answer they have all given is, that it cannot without a divorce. So the witnesses, who were examined on the part of Miss Lindo say, because they say, that it is only a betrothment, and not a marriage, although it has that effect.

The next question is, "Whether the assertion of Maimonides, "as cited by Mr. Selden in his Uxor Ebraica, b. 2. c. 1., where "it is declared, 'that the woman who has received Kedushim is "verè uxor, truly a wife, although consummation hath not "passed,' is an assertion without foundation?" Upon that they differ: the persons who compose the Bethdin say, "that "the words, that Mr. Selden has quoted, are not applicable to a

LINDO v. BELISARIO.

" wife only, but they are applicable to a woman also who is only " betrothed, as well as married." The other two contend that it signifies a wife only. It seems to be a dispute merely about words, because Mr. Ish Yemene goes on and says, " that the Hupa, as " well as the Kedushim, is necessary to make a complete man " and wife ;" for he says, " It is afterwards required, that such " Jew and Jewess shall conform to the Rabbinical ceremony." That appears to be necessary for every thing, even for the inheritance. And he further says, " If a man, being a Jew, obliges " himself to give his daughter a marriage portion, and she should " take Kedushim, the man to whom she so becomes betrothed, " could not recover such portion, according to the Jewish law, " unless such obligation should be given to him." And again, Maimonides says, " the Hupa is necessary ;" and Beth Joseph says the same. And it appears that the Hupa, after Kedushim, makes a perfect marriage. But Mr. Ish Yemene says, " the " want of the Hupa does not invalidate the marriage in the " least ;" and it is the opinion of Solomon Lyon, " that the Hupa " is of no effect alone, but the Kedushim and Hupa together " complete the marriage." In that respect they ultimately agree, I think, although they call Kedushim a marriage, it is not perfect without the Hupa, which is necessary to entitle the man to the property.

Another question proposed is, " Whether a man, who has " given Kedushim, has not a right, acquired thereby, to call " upon the woman who has accepted it, to submit to con- " jugal embraces ? And whether the woman, who has re- " ceived the same, is not bound, in conscience and in law, to " submit thereto when duly called upon ?" To this the Beth-din answer in this manner: they say, " the right the man hath " acquired on the woman he hath betrothed is, that he can de- " mand of her to prepare herself for being admitted to the " matrimonial state, allowing her a certain period of time for " the purpose, and when that period is expired, it is expected " that she will surrender herself up to enter the Hupa, which " constitutes marriage, but even then she is not bound in con- " science or in law to submit thereto ; the measures taken " in case of non-compliance are, that she will be called before " the tribunal, and interrogated, why she doth not fulfil her " marriage promise to that man ? If she says that her non-com- " pliance proceeds from aversion, saying, ' she detests that man,' " then he is ordered immediately to give her divorce ; and were " he not to conform himself to the lawful mandate of the tri-

LINDO *v.* BELISARIO.

"bunal, he would be compelled to it; but if she alleges a frivolous and vexatious excuse, the tribunal administers to her salutary advice; and if that proves ineffectual, she is daily called out in the seminaries and synagogues for four successive weeks; and if she remains intractable, at the expiration of a twelvemonth, he will be compelled to divorce her."

"This is the opinion of Rabbi Isaac Alphassi, the first of the three chief guides, upon whose authority we determine all religious matters. Maimonides, who is the second authority of this nature, says the same with other Jewish doctors, some contemporary, and others prior and subsequent to the said Alphassi and Maimonides; but Raburn Ashur, who is the third authority in rank, his son, and the author of the Beth Joseph, with some others, differ, and say, that when a woman will not comply to perform what she did engage herself to, the man cannot be compelled to divorce her, but merely requested to it; but yet none say, that coercive measures can be made use of to compel her to enter the matrimonial state." To the same question, "Whether a man, who has given Kedushim, has a right acquired thereby to call upon the woman, who has accepted it, to submit to conjugal embraces, and whether the woman, who has received the same, is not bound in conscience and in law to submit thereto, when duly called upon?" Mr. Ish Yemene says, "That a man, who has given Kedushim, has power and force acquired by the Kedushim to call on his spouse to come to his house, to be at his command; and he has not only a right to call her to his house, to be under his command, but also the man is bound, by our Rabbies, to bring her to his house in the time above mentioned; and if he has not brought her to his house in the time above mentioned, our learned men compel him to maintain her, though she is not in his house, it being his fault." He then adds, "all the above is clear by the law, as it is declared in the Gemara treatise of Ketubot, fol. 63. The woman who rebels against her husband in conjugal points, let her be proclaimed four Saturdays in the synagogue, and the Bethdin ought to send her a message to let her know, that if she does not within the four weeks submit herself to her husband's command, though her dower be very considerable, she shall lose the whole, as well the betrothed as the wife;" for this he quotes Maimonides, Raburn Ashur, and Tur; and he adds, that "Beth Joseph further says, 'that even after the warning and forfeiting her whole dower, it is at the husband's option to give her *Guet*, but he can never be compelled.'"

Solomon Lyon says, in general terms, in answer to the fourth question, " He certainly has a right to demand his wife, and she " is obliged to comply, both in conscience and law, as is fully " contained in the Gemara de Ketubot, fol. 59." This they have given as their private opinion; for in truth it is no more. Of the other three, two are in office to execute the office of High Priest, and the other is called in by them to determine any case that comes before that tribunal. They give a contrary opinion, and expressly say, " that if a woman, after Kedushim, has left her " husband, and if she persists in refusing to return to her hus- " band, whether it is for a solid or a frivolous reason, the Bethdin " will order and compel the man to give a divorce."

The general result of the evidence is this; there has been what they call, I think, a complete Kedushim between the parties; that Kedushim, as they all prove, will, in order to dissolve it, and in order to give the woman a power to marry again, need a divorce; but it does not of itself create a perfect marriage, because it does not give the husband the rights of marriage; for they all agree, and there is no contradiction whatever, that after the Kedushim is given, the wife retains her rights, she has a power over her own property as much as before, and the husband has no power over it at all.

With respect to the other point, whether the husband can be compelled to release the woman, and give her an authority to part, upon that they differ. But the Bethdin, the persons to whom the application must be made to carry it into effect, say, " that if a wife persists in refusing to return to her husband, the " husband may be compelled to give a divorce." In what light then does this woman appear? What is her state and condition? — Is she a perfect wife? No, they all say. Has the husband acquired the civil rights of marriage? No, none of them, — they all prove that. Is it possible then for this Court to make a return to the Court of Chancery, and say, that this person is now the wife of Mr. Belisario, as he has claimed her to be; when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it? That if she was to die, he would have no right at all.

What can the Court do then? Can the Court order the Hupa? That would be strange indeed, for the Ecclesiastical Court to be carrying into execution a marriage between two Jews. Can the Bethdin do it? The Bethdin say, no. Why does he not try the Bethdin? The Kedushim was given in 1793, and more than three years has clapsed since. Has there

LINDO v. BELISARIO.

been any application to the Synagogue, which, they say, is necessary to complete the marriage, to give him the collective rights of the husband? None. It has been thrown out, by the counsel, that there is an injunction which would prevent her marrying. That I cannot tell. All that the Court of Chancery has done is, to prevent this man from having access to her, or writing letters to her, to prevent him from entering into a contract of marriage. Whether it would prevent them from applying to be admitted to the Hupa, I cannot tell; but certain it is upon all the evidence, that without that ceremony, without the Hupa, they are not perfect man and wife. As I have already stated, the question is not whether Miss Lindo is now at liberty to marry any man she pleases, but whether she is the wife of Aaron Mendes Belisario or not? I think it is clear, from the evidence, that she is not; that the ceremony which has passed, although it prevents her from marrying any other man until a divorce is given, does not give him any authority over her fortune, or person. A man cannot be the husband of a woman, by the law of England, without having the civil rights, which he has not; and therefore, under all the circumstances, I am of opinion, that the sentence given by the Judge of the Consistory Court is perfectly right, and I shall confirm it.

No. 5.

53 Geo 3. c. 127. An Act for the better regulation of Ecclesiastical Courts in England; and for the more easy recovery of Church Rates and Tithes. [12th July 1813.]

WHEREAS it is expedient that Excommunication, together with all proceedings following thereupon, should, saving in certain cases, be discontinued, and that other Proceedings should be substituted in lieu thereof, and that certain other regulations should be made in the proceedings of the Ecclesiastical Courts; and that more convenient Modes of recovering Tithes and Church Rates in certain cases should be provided; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, That from and after the passing of this act, excommunication, together with all proceedings following thereupon, shall in all cases, save those hereafter to be specified, be discontinued throughout

throughout that part of the United Kingdom of Great Britain and Ireland called England; and that in all causes which according to the laws of this Realm are cognizable in the Ecclesiastical Courts, when any person or persons having been duly cited to appear in any Ecclesiastical Court, or required to comply with the lawful orders or decrees, as well final as interlocutory, of any such Court, shall neglect or refuse to appear, or neglect or refuse to pay obedience to such lawful orders or decrees, or when any person or persons shall commit a contempt in the face of such Court, no sentence of excommunication shall be given or pronounced, saving in the particular cases hereafter to be specified; but instead thereof it shall be lawful for the Judges or Judge who issued out the citation, or whose lawful orders or decrees have not been obeyed, or before whom such contempt in the face of the Court shall have been committed, to pronounce such person or persons' contumacious and in contempt, and within ten days to signify the same, in the form to this act annexed, to his Majesty in Chancery, as hath heretofore been done in signifying Excommunications; and thereupon a writ *de contumace capiendo*, in the form to this act annexed, shall issue from the Court of Chancery, directed to the same persons to whom the writs *de excommunicato capiendo* have heretofore directed; and the same shall be returnable in like manner as the writ *de excommunicato capiendo* hath been by law returnable heretofore, and shall have the same force and effect as the said writ; and all rules and regulations not hereby altered, now by law applying to the said writ and the proceedings following thereupon, and particularly the several provisions contained in a certain act passed in the fifth year of Queen Elizabeth, intituled 'An Act for the due execution of the writ *de excommmunicato capiendo*,' shall extend and be applied to the said writ *de contumace capiendo*, and the proceedings following thereupon, as if the same were herein particularly repeated and enacted; and the proper officers of the said Court of Chancery are hereby authorized and required to issue such writ *de contumace capiendo* accordingly; and all Sheriffs, Gaolers, and other Officers are hereby authorized and required to execute the same, by taking and detaining the body of the person against whom the said writ shall be directed to be executed; and upon the due appearance of the party so cited and not having appeared as aforesaid, or the obedience of the party so cited and not having obeyed as aforesaid, or the due submission of the party so having committed a contempt in the face of the Court, the Judges or Judge of such Ecclesiastical Court shall pronounce such party

 absolved

absolved from the contumacy and contempt aforesaid, and shall forthwith make an order upon the Sheriff, Gaoler, or other officer in whose custody he shall be, in the form to this act annexed, for discharging such party out of custody; and such Sheriff, Gaoler, or other Officer shall, on the said order being shown to him, so soon as such party shall have discharged the costs lawfully incurred by reason of such custody and contempt, forthwith discharge him.

Provided always, and be it further enacted, that nothing in this act contained shall prevent any Ecclesiastical Court from pronouncing or declaring persons to be excommunicate in definitive sentences, or in interlocutory decrees having the force and effect of definitive sentences, such sentences or decrees being pronounced as spiritual censures for offences of Ecclesiastical Cognizance, in the same manner as such Court might lawfully have pronounced or declared the same had this act not been passed.

And be it further enacted, that no person who shall be so pronounced or declared excommunicate, shall incur any civil penalty or incapacity whatever in consequence of such excommunication, save such imprisonment, not exceeding six months, as the Court pronouncing or declaring such persons excommunicate shall direct; and in such case the said excommunication, and the term of such imprisonment, shall be signified or certified to his Majesty in Chancery, in the same manner as excommunications have been heretofore signified, and thereupon the writ *de excommunicato capiendo* shall issue, and the usual proceedings shall be had, and the party being taken into custody shall remain therein for the term so directed, or until he shall be absolved by such Ecclesiastical Court.

INDEX.

A.

Page

ABATEMENT—See *Practice* - - - 2
Adultery—Cause of Divorce - - 144, 269, 299, 439
how proved - - - 278, 300
inference from Cohabitation conclusive - - 445
from going together to a Brothel - - 302
Visits at private Lodgings, how distinguished - 303
Appendix—Papers relating to the Jews - - 1 et seq.
Sentence on Appeal Lindo *v.* Belisario - - 7
Stat. 53 G. 3. ch. 127. Excommunication discontinued, *sub modo* - - - - - 24
Appropriation—See *Impropriation* - - - 163
Term peculiar to England - - - } ib.
Annexiones, Donationes, Uniones, the common terms } ib.
Approximate Acts—See *Adultery* - - - 270, 278
Principles of Presumption and Inference in all Writers 279
Inference therefrom, not limited to the Conclusion of Witnesses - - - - - 277
Facts, whether inferring Adultery or *mere Solicitation* - - - - 278, 373, 377
Articles of Religion—Observations thereon - - 428
preaching contrary *thereto,* and 13 Eliz. c. 12. cause of deprivation - - - 424
Stone's Case, under Statute - - ib.
Whiston's Case, 1714 *generally* - - 433
Assoiler, or *Deliverance,* Writ of.—See *Excommunication* - 500

B.

Bethdin, or Jewish Tribunal - - - 225
Betrothment—See *Jewish Marriage* - - - 219

Bishops

Page
Bishops—Residences in *London*, &c. anciently *Extra-Diocesan* - - - - - - 23
Privilege, *if* attaching to modern Residencies? - 32
merges, on transfer of the Mansion to other Uses - 21
Ely *Chapel*, as formerly part of Ely *Episcopal House*, how far Extra-Diocesan;—not so held - 21 et seq.
History connected therewith - - - 24
Provisions as to the present House, Stat. 12 G. 3. cap. 43. - - - - - - 26

C.

Canons—how construed - - 20, 393, 437, 464
Church—See *Faculty*, *Seats*, &c.
Churchwarden—Persons liable, from a House of Business - 379
Persons disqualified - - - - - 10
Aliens, Papists, Jews, Children - - ib.
by Offences - - - - ib.
Election by Poll - - - - 12
Court cannot interfere but in dubious cases - 13
Duties of - - - - - - 173
Authority limited - - - - ib.
Responsibility for illegal Orders to others - - 172
Citation—Form of—See *Practice* - - 157, 169, 424
Collusion—See *Divorce* - - - - 451
Condonation—See *Divorce*.
in strictness should be pleaded - - - 291
but may be *noticed* by Court, to what effect? - 292
Confession—of Adultery, must not be *ambiguous* - 305
in conjunction with other Circumstances, how received in proof - - 304
Connivance—See *Divorce* - - - - 450
Consanguinity—*in* moral effect, between natural Relations - - - - 344, 353
proveable by *circumstances* and repute, &c. - 387
Consent of Parents—See *Nullity of Marriage* - - 262
by the Roman Law, by the Canon Law, by Marriage Act - - - - 262, 347, 354
what sufficient, *formal*, or in Writing, not required - 267
onus probandi, of want of Consent and Minority - 263, 347
may be retracted - - - - 265
dissent, in such case, to be distinctly signified - ib.

Contumacy

Page

Contumacy—in lieu of Excommunication, in Process, by Stat. 53 *G.* 3. *ch.* 127. - - - App. 24
Costs—Deduction as to Matters not proved - 20, 378, 506
Cruelty—Cause of Divorce *a mensa et thoro* - - 35
what so held - - - 37
Danger to Life, Limb, or Health - - 39
Words, menacing, with Danger *sufficient* - 364, 409
of mere Insult or Irritation, *not* - - ib.
many Acts, not required - - - 459
single Act, not *usually* sufficient - - - 458
Presumptions, how entertained - - 105
Complaint on part of Wife - - - 361
on part of Husband - - - 409
Evans's Case—ex parte ux. not sustained - 35
Holden's Case—ex parte ux. sustained - - 453
Kirkman's Case—ex parte mar. sustained - - 409
Oliver's Case—ex parte ux. not sustained - - 361
Desertion, alone, not sufficient - - - 120
in suit of Divorce for Cruelty, the Court cannot order Return - - - - - ib.

D.

Defamation—Restriction as to Words - - 464
imputing an Ecclesiastical Offence - ib.
as to Words not actionable - - 465
as to Time, by Stat. - - - 213
as to Proof by Two Witnesses - 463
not limited to identical Acts, - ib.
Deprivation—by Stat. 13 Eliz., for preaching contrary to the *Articles*—See *Articles of Religion* - - 424
Form prescribed by Canons - - - 433
Dilapidation—See *Sequestration* - - - 309
Divorce—by reason of Adultery - - 144, 269
barred by Recrimination - - - 144
by Condonation, under what Circumstances - 130
by Connivance - - - 146
not barred by Time, *sub modo* - - - 134
by Separation - - - 142
by Unkindness or Cruelty - 146, 452
by Desertion - - - 120

not

Divorce—continued. Page
not barred by mere Forbearance or Delay in instituting Proceedings on the part of the Wife - 132
Refused for defect of Identity - - - 307
by reason of Cruelty—See *Cruelty*.

E.

Election—See *Churchwarden* - - - 9
Ely Chapel—See *Bishop's Residencies* - - - 23
Error—not affecting the Contract of Marriage,
in Family - - - - 222
in Fortune - - - - - ib.
in *Nomine* - - - - 437
in *Qualitate* - - - - - ib.
Evidence—See Witnesses.
Exception to Witnesses - - - 95
before Publication, *general* - - - 98
after, *not*, except as *introductory* to Special Matter - - - - - 99
Limitations and Rules - - - - 102
contrà Personas - - - - 99
Dicta - - - - - 100
must impute *falsitatem cum corruptione* - - ib.
must not impute *Felony* in direct terms - - 141
Examiner, Duties of—as to Specification on general Pleas - 96
in *Specification*, when introduced, as to *Time* and *Place*, &c. - - - - 97
Excommunication—discontinued, *sub modo*, by Stat. - App. 24
also, "any Civil Penalty or Incapacity thereon. save Imprisonment," as regulated by the Statute - ib.

F.

Faculty—or Permission of the Ordinary—for material Alteration in Churches, *required*
for erecting a Gallery - - - 188
Consent of Parish in Vestry, how considered - 189
not *binding* on the Ordinary in Matters subject to his Discretion - - - ib. 201
Majority, how binding on the Parish, in competent Acts - - - - - - 200
how ascertained - - - - 190
Objections overruled - - - - ib.
for erecting an Organ - - - - 198
according

Faculty — continued. Page
according to the Circumstances of the Parish - 199
Objection in form - - - - 198
in substance — over-ruled - - ib. et seq.
Clause for preventing permanent Expence to the Parish, *not necessary* - - - 199 et seq.
for Tombs and Monuments — See *Office of the Judge promoted.*
Father — how considered - - - 339 et seq.
natural and lawful Father may sue, in *Nullity* of Marriage, by reason of Minority, &c. in his own right, contrary to the wish of the Minor - 215
or as *Guardian, ad litem* - - - ib.
may continue such Suit after the Minor comes of Age - - - - - - ib.
whether he may commence *after* Age? - - ib.
Prayer, that the Minor should intervene, and declare, whether he concurred, on *coming* of Age, rejected, the Suit being substantially commenced - ib.
See *Parents, Consent of Parents, Guardians.*
Felony — or other Capital Crimes, how pleadable in the Ecclesiastical Court - - - 140
not for Punishment - - - 141
as incidental Matter - - - ib.
or by pleading the Conviction - - ib.
ancient Authority - - - ib.
Foreign Court — Sentence of Divorce, how pleadable - 295, 297
of Nullity, if necessarily and universally binding on other countries - 297
as to the jurisdiction of a third Country, not being the Country where the Marriage was celebrated, nor that to which the Parties belong, quære - - ib.
Sentence not to be explained by parol - - 298
Explanation as to false Assignment of Ground of Sentence of the Court of Brussels, incredible - ib.
Foreign Law—or *lex loci*, received from Opinions of Advocates and Professors, though not on Oath - 249
Practice therein conformable to *that* of the Court of Chancery - - ib.
Free Chapels — Exemptions may continue as to Visitation, though subject to Institution - - 22
on the ancient Demesnes of the Crown - - 32
whether such could now be cut out of the original Diocese? - - - - ib.

G.

Page

Guardian—by Law - - - - 348, 351
Testamentary - - - - 349, 355
by Appointment of Chancery - - - 349
of Ecclesiastical Court *ad litem* - - - 498
Policy of that Practice - - - 499
not compulsory on the Father - - 500
Renunciation, of Femme Coverte, without Consent of the Husband, if questionable by a Third Party - 5

H.

Hupa, or *bringing home*—See *Jewish Marriage* - 242, 257
Husband and Wife—See *Divorce*, *Nullity*, &c.

I & J.

Jactitation of Marriage—used to put a Party on Proof of validity of Marriage - - - 216, 324
Identity—in Divorce, how proved - - - 305
not by mere acknowledgment to the Officer - ib.
not by Appearance in the Cause - ib.
Jewish Marriage—tried by Reference from the Court of Chancery - - - 216, 324
by Jewish Law, as *Foreign* - 248, App. 11
Evidence from the Bethdin - 260
from private Rabbies 216 et seq.
Ceremonies,
Kedushim, or *Dedication* with Delivery of the Ring - - - 234, 244, App. 16
Ketuba, or Marriage Contract - - 229
Hupa, or *bringing Home* - - 242, 257
perfect Marriage, *what?* - - 239 et seq.
not without Consummation - - - 238
Consummation cannot be compelled, in virtue of prior Ceremonies - - 248, 253, App. 7
Betrothment - - - - - 225
doubtful Betrothment defective in Law - 220, 246, 247, 250
Passage in Selden corrected - 240, 244, 252, 253
Consent of Father, not necessary - - 222

Jewish Marriage—continued. Page
Witnesses, Two competent, required, as a constituent
Part of the Ceremony - - - 324
competency, how affected - - 325
by Relation - - - - ib.
by neglect of Ceremonial Observances - 330 et seq.
Jews — ancient State and Condition in England - - 217
Banishment - - - - - ib.
Return - - - - - - ib.
Particulars relating to—Orders in Council, 1673 and
1685, Articles of Faith, Talmud, Commentators,
Literature, &c. - - App. 1, et seq.
Illegitimate Relations — See *Father, Marriage, Parents.*
Impropriation — Origin in Benefactions to Religious
Houses - - - - 163
of Two Kinds,
in temporalibus - - - ib.
in pleno et utroque jure, tam in spiritualibus quam
in temporalibus - - - - 164
Distinction as to Exemption from Ecclesiastical
Jurisdiction - - - - ib.
from the latter, licensed Curacies without Institution - - - - 166
Appropriation *ad mensas,* of the latter kind - 165
not to be presumed - - - 167
at Dissolution of Religious Houses — *continued* as
before - - - - 162
Lay *Fees* therein - - - - 165
Distinction, as to patronage of Curacies - - 167
Patronage — where vested - - - 168
Mary-le-Bone, Quebec Chapel, *St. Margaret's,* West.
166, 168, 169
Incestuous Cohabitation - - - - 384
Separation, Penance - - - 386, 393
Declaration of Nullity, where Marriage is proved to
have been celebrated - - - 393

L.

Licence, Marriage — See *Nullity of Marriage.*
of the Bishop *to preach* — in the Parish Church, not
without Consent of the Incumbent - - 161
to preach in Quebec Chapel, not questionable, in
Civil Suit, by the Impropriator of Mary-le-Bone
Interest not being shewn - - - 157

M.

Page
Marriage Contract - - - - - 230
Natural, Civil, Religious - - - - 232
vinculum matrimonii, not affected by Rights of Property - - - - - 236
indissoluble - - - - 36
Nullity of — See *Nullity.*
Marriage Act — 26 *G.* 2. *ch.* 33. strictly construed - 262
See *Nullity.*
Misnomer — of Parties, cured by Appearance - - 3
Name to be averred - - - - 187
binding - - - - - ib.
of the Parish - - - - - - 6
of the Judge - - - - 2, 205
of the Office promoted - - - - 4
Monument — to erect, and to remove, a Faculty required - - - - - 14, 212
Flat Stone in Church-yard—what Consent necessary - 14
Music — in Church - - - - 175
in Cathedrals — in Parish Churches - - 177
according to the Circumstances of the Parish - 199
Interruption to—allowed by Consent of Parish and Ordinary; punishable - - 173
Practice in Foreign Churches, Catholic, Lutheran, Calvinistic - - - - 176
Psalmody, subject to the Regulation of the Ordinary 175

N.

Nullity of Marriage—Suit not discretionary in the Court - 138
by reason of the *Place,* 26 G. 2. ch. 33. - - 136
Embassador's Chapel, Privilege, whether allowed, and for whom? - - - - 138
refused, to Persons not being of the Embassador's Suite, or Country - - ib.
by reason of Insanity, *dicta contrà* refuted - - 416
by reason of Publication of Banns in *Names* not being the *true* Names of the Party, as required by Stat. 26 G. 2 cap. 33. § 1, 2, 8. - - - 394
what names so held - - - ib.
Surname how far *ad arbitrium* - - 399
dictum of Sir Jos. Jekyll considered - 400
variation when *fatal* - - - 401
Names

Nullity of Marriage—continued. Page
Names of illegitimate Children how considered - 402
Name of the Mother held sufficient - - 407
by Licence, by reason of Minority and want of Consent, as required, 26 G. 2. ch. 33. § 8. - 213, 262, 387
See *Father, Guardian, Parents, &c.*
Provisions of the Statute *as to true Names,* not held to extend to Marriages by Licence - 434, 438
Exception for *fraud* in supposed Cases - ib.
by reason of Affinity and Consanguinity - - 393
by the *Jewish Laws* amongst Jews. See *Jewish Marriage* - - - - - 216

O.

Office promoted, or form of Criminal Suit - 206, 209
Style of, *Bishop,* or *Judge, immaterial* - - 206
for raising Tombs in the Church-yard, without due Authority - - - - 14
by Faculty - - - ib.
by Custom - - - ib.
for erecting a Monument in the Chancel - - 208
Fees thereon to the Minister - - - ib.
for preaching without Licence of the Bishop of London, in Ely Chapel - - 21
for obstructing the Singing and Musical Service in the Church - - - - - 170
for *Quarrelling, Chiding,* or *Brawling* in the Church, 5, 6 Edw. 6. cap. 4. § 1. - - 2 181
Two Witnesses to the particular Act, required by Stat. - - - - 182
for preaching contrary to the Articles of Religion - 424
Form of Citation therein - - - ib.
for incestuous Cohabitation - - - 384
Official Principal exercises the contentious Jurisdiction of the Bishop - - - - 4, 206
Ornaments—Church, Law as to Consent of Parishioners - 199
Consent of Parish, how taken, by *Majority* of numbers and interest - - - - 200
Organs, how considered, as *necessary* or *ornamental* - 199
as to Cathedrals - - - ib.
as to Parish Churches, according to the Circumstances of the Parish - - ib.
Othobon—Constitution of - - 165

P.

Page

Parents—under 26 G. 2, ch. 33. § 11, not construed to admit consent of illegitimate Parents - 339, 350, 360
illegitimate Parent cannot appoint a Guardian - 339, 345
nor institute a Suit of Nullity, by virtue of minority, &c. - - - - 341
Construction of Temporal Courts on particular Statutes relating to Parents considered - 341, 351
Construction of Ecclesiastical Courts - 356, 359
whether the illegitimate Father can take a Child from the Possession of the Mother - - 352
Father of a Person of full Age being Insane, not competent to bring Suit of Nullity of Marriage (contracted *after Age*), by reason of Insanity of the Son 415

Particeps Criminis—in Adultery - - - 150, 376
See *Witnesses*.

Practice—Error in Bar, in Abatement - - 2
Citation in Criminal Suit abated by wrong description of the Judge - - - - 1
by wrong description of the Office - - 4
Misnomer of the Party. See *Misnomer* - - 3
of the Parish - - - - 7
variance between Citation and Articles - - 172
as to demand of Articles on Appearance - - 170
Exception as to Defamation - - 171
Commencement of Suit from Issue joined,—in what Case - - - - - 213
Construction on delay by false *Averment* - ib.

Pleading—Objection as to relevancy - - 219
to pleading of general Character - 40
to loose Averments incapable of proof - 52
in exception to Witnesses, general—specific. See *Evidence*. - - 98
opening Pleadings after publication for defensive plea, 101
from surprize owing to want of due *Specification*, in the original Plea - - - - ib.

Psalmody—See *Music* - - - - 175

Q.

Quakers—not included in the Marriage Act - - 217
Form of Marriage - - - - App. 9

Quakers — continued. Page
how far they can maintain a Suit in the Ecclesiastical Court on such Marriage - - - App. 9
Quarrelling, Chiding, Brawling—See *Office promoted.* - 181
Proceedings under the general Ecclesiastical Law, - ib.
under Stat. 5, 6 Edw. 6. ch. 4. - - 2, ib.
construed to require Two Witnesses to each fact 183
words sufficient - - - 183. 184
not *sufficient* - - - - 185

R.

Recrimination—Principle of - - - 147
by Roman Law as to Dower - - - 148
by Canon Law - - - - - - ib.
not in Criminal Suits - - - - 148
sustained on facts not so strong as might be necessary to sustain a Suit of Adultery - - 153
Restitution of Conjugal Rights—barred by Adultery - ib.
by Cruelty - 361
not barred by mere lapse of time - - 135
Revocation of Heretical Errors—what required? - 430 & seq.

S.

Seat in Church may be required by every Householder, for himself and Family - - - 194
to be assigned by the Churchwardens, acting under submission to the Ordinary - - - 316
return, *want of Room*, how far good - 317
as to liberty to erect Seat at private Expence not good - - - - ib.
compounding for Payment in easement of Parish Rates, not allowed - - - ib.
Appointments so made quashed - - 318
Appurtenant to a House, will go to the Tenant 322
not to be let to Strangers - - - 319
Faculty to a man and his heirs bad. See *Faculty* - 321
by Custom - - - - 194
by Prescription—by Possessory Right - - 195
Separation—Articles, how considered in the Ecclesiastical Court - - - - 119, 143
at Common Law - - - - ib.

Page

Sequestration—Writ of - - - - 311
Priority of Writs - - - - ib.
not suspended on averment of Error - - 312
Sequestrator, liable for Dilapidations - 307, 310
Claim to satisfy *Writ*, as *prior demand*, not sustained - - - 309, 310
Allowance for Repair - - - - 314
how to be pleaded — not for specific Sum - ib.

Statutes referred to—1 Edw. 1.—Jews - - 217
9 Edw. 2.—Articuli Cleri - - - 495
15 Ric. 2.—Appropriation - - - 163, 165
4 Hen. 4.—Do. - - - - ib.
10 Hen. 6.—Do. - - - - 163
23 Hen. 8. c. 9.—Citations - - - 7, 27
27 Hen. 8. c. 4.—for Pirates, &c. - - 461
c. 28.—Monasteries given to the King, &c. - - - - 162
31 Hen. 8. c. 13.—Dissolution of Monasteries, &c. - 26, 162
33 Hen. 8. c. 31.—Diocese of Chester, &c. - 25
5 & 6 Edw. 6. c. 4.—against brawling in Church, &c. 2, 181
4 & 5 Phil. & Mar. c. 8.—relative to Children taken away from Parents and others - - - 342
1 Eliz.—Liturgy, &c. - - - 177
13 Eliz. c. 12.—Preaching contrary to the Articles 424, 5, 6
c. 8.—Usury - - - - 465
18 Eliz. c. 2.—reputed Father and Mother of bastard Children - - - - 340
43 Eliz.—Poor - - - - ib.
4 Jac. 1. c. 5.—Drunkenness - - - 465
21 Jac. 1. c. 20.—Swearing - - - ib.
13 & 14 Car. 2. c. 12.—as to Constables - - 383
6 & 7 W. 3. c. 11.—Swearing - - - 465
c. 6.—Duties on Marriage, &c.—Clause, "That it shall not be construed "to make good or effectual in "Law, any such Marriage or "pretended Marriage of Jews, "Quakers," &c. - - App. 7
5 Geo. 2. c. 30.—Bankrupts - - - 470
15 Geo. 2. c. 30.—to prevent the Marriage of Lunatics - - - - - 417
19 Geo. 2. c. 21.—Swearing - - - 465

Statutes — continued. Page
26 Geo. 2. c. 26.—for the Naturalization of the Jews repealed by 27 Geo. 2. c. 1. - 217
c. 33.—for the better preventing clandestine Marriages, &c. - 136, 141, 217, 263, 337, 338, 360
12 Geo. 3. c. 43.—relative to Ely House in Holborn - - - - - 26—30
53 Geo. 3. c. 127.—Excommunication discontinued *sub modo* - - - - - App. 24.
57 Geo. 3. c. 98.—for the Sale of the Impropriate Rectory, &c. of St. Mary-le-bone to the Crown - 169
Swearing—not punishable in the Ecclesiastical Courts - 465
See *Defamation*.

T.

Tithes—Subtraction of - - - - - 478 & seq.
notice of setting out for great Tithes not required - 479
for small Tithes generally? quære - - ib.
by Custom - - - - ib.
by Agreement - - - - ib.
of Mills, by Toll Dish, superseded by modern authorities - - - 493, 494
by Profits,—Deductions and Allowances 503 & seq.
usually decided on the Answers of the Party - 503
Allegation when given, should not contradict the Answers - - - - - ib.
of sundry Articles, Cows, Calves, Pigs, Carrot Seeds, Barley rakings, Clover and Grass, Easter Offerings—Agreement—Proof as to - 487 et seq.
Occupier liable - - - - 490
Vendee - - - - - - ib.
if covered by a Certificate of Bankruptcy - 470, 474
Endowment construed - - - 501

V.

Vicar General— how distinguished from Official Principal - - - - - 4, 206
Vicarages—how endowed, &c. - - - 165
Verdict—in Divorce, how considered - - 156
not to be impeached as false - - 289, 306
or as erroneous - - - - - - 290
may be shewn to have been obtained by collusion - ib.

W.

Page
Whiston's case cited - - - - 433
Witnesses - - - - - 182
specific Number when required — Brawling — Defamation - 182, 461
Particeps Criminis not excluded - - - 376
Father, in Suit of Nullity instituted by him during Minority, but continued after Age by the Son, not excluded - - - - - 419
subornation of - - - - 268, 288

END OF THE FIRST VOLUME.

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